Supreme Court, U.S.
FILED

No. 03-677 NOV 3 2003

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In The

Supreme Court of the United States

GLENN A. HAWKINS, NEDRA J. HAWKINS, MARTIN F. RADMER, GERALD W. BREDENBERG, JOANNE JUST, CHRISTOPHER E. SCHROEDER, AND CHARLES SATTLER,

Petitioners,

v.

AID ASSOCIATION FOR LUTHERANS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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176 pp

QUESTIONS PRESENTED

1. Whether a remand order pursuant to 28 U.S.C. § 1447(c) for lack of subject matter jurisdiction is *res judicata* on the issue of subject matter jurisdiction even though 28 U.S.C. § 1447(d) precludes appellate review of the jurisdictional determination.

2. Whether the unconscionability of an arbitration clause under the Federal Arbitration Act, 9 U.S.C. § 2, is a gateway dispute which raises a question of arbitrability for a court, not an arbitrator, to decide.

3. Whether standing exists to compel arbitration under the Federal Arbitration Act, 9 U.S.C. § 2, pursuant to an arbitration clause that is the third step of a dispute resolution process when the claim has not yet matured to the arbitration stage of the process.

STATEMENT PURSUANT TO RULE 29.6

Petitioners Glenn A. Hawkins, Nedra J. Hawkins, Martin F. Radmer, Gerald W. Bredenberg, JoAnne Just, Christopher E. Schroeder, and Charles Sattler state that they are individuals, not a corporation and have no publicly traded stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the Seventh Circuit is reported as *Hawkins v. Aid Ass'n for Lutherans*, 338 F.3d 801 (7th Cir. 2003) ("*Hawkins II*"). App. 1-13. The two opinions issued by the District Court for the Eastern District of Wisconsin compelling arbitration on October 31, 2001 are unreported. App. 14-36 and 37-56. The September 27, 2000 order of the Eastern District of Wisconsin denying petitioner Radmer's motion to dismiss on subject matter jurisdiction grounds is unreported. App. 88-93. The October 4, 2000 memorandum and order of the District Court for the Northern District of Indiana transferring *Hawkins v. Aid Ass'n for Lutherans* to the Eastern District of Wisconsin is unreported. App. 57-58. The April 27, 2000 order of the District Court for the Western District of Missouri remanding *Radmer v. Aid Ass'n for Lutherans* to the Circuit Court of Jackson County, Missouri is unreported. App. 59-75.

STATEMENT OF JURISDICTION

The Court of Appeals issued its decision on August 5, 2003. Petitioners did not petition for rehearing or rehearing *en banc* prior to filing this petition. This petition is filed within 90 days from the date the Court of Appeals

issued its decision. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Federal Arbitration Act, 9 U.S.C. § 1, et seq., specifically, section 2, provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

28 U.S.C. § 1447, governing the procedure after removal, provides in pertinent part:

> . . . .
>
> (c) A motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State

court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

STATEMENT OF THE CASE

This case presents three important legal issues. The first question asks whether a 28 U.S.C. § 1447(c) remand order, which is unappealable under section 1447(d), precludes re-litigation of the underlying jurisdictional issue. The second question, arising under the FAA, concerns the question of who decides whether an arbitration provision is unconscionable and therefore unenforceable under section 2 of the FAA. The third question is one of standing to assert claims under the FAA when a party seeks to prematurely enforce an arbitration provision, the third step under a three-step alternative dispute resolution process.

This case poses important questions in the arbitration context concerning the scope of the Article III case or controversy requirement and the parameters of the FAA at a time when mandatory arbitration provisions are increasingly imposed on parties to adhesion contracts. The *res judicata* issue, which stems from a disagreement between two federal district courts over the fundamental question of subject matter jurisdiction under 28 U.S.C. § 1332, is significant because it raises an issue never before addressed by this Court concerning the interplay between

the congressional mandate that a remand order be final and unappealable, and a federal district court's contradictory decision that the remand order is not binding, but may instead be disregarded by subsequent federal courts presented with the same jurisdictional issue between the same parties. The standing issue concerns the power of a federal court to compel parties to arbitrate under the FAA when the requirement to arbitrate has not yet arisen under a contractual three-step alternative dispute resolution process.

Petitioners are purchasers of life insurance policies. Petitioners purchased the policies from Respondent Aid Association for Lutherans ("AAL"). AAL is a fraternal benefit society with more than 1.7 million members. Internally, AAL is governed according to its articles of incorporation and bylaws.

The policies purchased by Petitioners incorporated by reference AAL's articles of incorporation and bylaws. The bylaws in effect at the time Petitioners purchased their policies did not contain an arbitration provision or any type of alternative dispute resolution process. App. 101-116. On March 27, 1999, many years after Petitioners purchased their policies, AAL repealed its bylaw clause concerning court action and replaced it with a mandatory dispute resolution process. App. 117-136. The newly enacted dispute resolution process prescribed the following three-step procedure for dispute resolution:

> Resolution of Disputes, Section 12.
>
> . . . .
>
> (c) Procedures. No lawsuits or any other actions may be brought for any claims or disputes covered by this section. The following are the

steps and procedures for presenting and resolving disputes:

Step 1. Appeal. Appeal of the dispute to a designated reviewer within the Association as appropriate to the dispute.

Step 2. Mediation. If step 1 does not result in a mutually satisfactory resolution, either party has the right to have the matter mediated in accord with the applicable mediation rules of the American Arbitration Association (or other neutral organization as agreed upon by the parties).

Step 3. Arbitration. If there is still no mutually satisfactory resolution, the matter will be resolved by binding arbitration in accord with rules of the American Arbitration Association. The arbitrator(s) may award any actual damages incurred for which there is liability, but may not award attorney's fees, or compensatory, exemplary, extra-contractual or punitive damages. The decision of the arbitrator(s) is binding and final. Additional procedural rules may be defined in policies established by the Association and made available upon request. If a claim or dispute is subject to law that prohibits parties from agreeing to submit future disputes to binding arbitration, arbitration results shall be non-binding, unless both the individual and the Association voluntarily agree to binding arbitration after the claim or dispute has arisen.

The Underlying Actions

On August 5, 1999, *Radmer v. Aid Ass'n for Lutherans*, Case No. 99-CV216424 ("*Radmer I*"), was filed in the

Circuit Court of Jackson County, Missouri. AAL removed *Radmer I* to the Western District of Missouri on the basis of diversity jurisdiction. On October 12, 1999, after it had already removed the *Radmer I* Missouri state court action, AAL filed a separate lawsuit in the Eastern District of Wisconsin, *Aid Ass'n for Lutherans v. Radmer*, Case No. 99-C-1205 ("*Radmer II*"), naming the Radmer Petitioners. App. 94-100. *Sattler v. Aid Ass'n for Lutherans*, Case No. 99CH15334 ("*Sattler*") was filed in Illinois state court on November 2, 1999, was removed by AAL to the Northern District of Illinois, and transferred to the Eastern District of Wisconsin. *Hawkins v. Aid Ass'n for Lutherans*, Cause No. 85C01-0007-CP-344 ("*Hawkins I*") was filed in Wabash County, Indiana on July 18, 2000, was removed by AAL to the Northern District of Indiana and transferred to the Eastern District of Wisconsin. Each of these underlying cases asserted claims against AAL arising out of AAL's sale of "vanishing premium" insurance policies. Each case asserted claims under several legal theories including: breach of contract, fraud, negligence, breach of fiduciary duty, and unjust enrichment.

In *Radmer II*, AAL asserted that arbitration was the "sole means" for AAL members to present and resolve disputes regarding their insurance policies and requested an order from the federal court in Wisconsin compelling Petitioners to arbitrate the claims they had asserted in *Radmer I*, which was still pending in the federal court in Missouri. App. 94. After the *Sattler* case was filed, AAL amended its petition to compel arbitration to include the Sattler Plaintiffs. The stated jurisdictional basis for these actions was diversity.

The Radmer Petitioners challenged the jurisdiction of the Eastern District of Wisconsin on the basis of lack of

personal and subject matter jurisdiction. App. 88-93. While this jurisdictional question was pending in *Radmer II*, the same issue, which had previously been raised by the Radmer Petitioners in the Western District of Missouri in *Radmer I*, was decided. On April 27, 2000, the Western District of Missouri held that it did not have subject matter jurisdiction because not all plaintiffs satisfied the required jurisdictional amount and remanded *Radmer I*. App. 59-75. The Radmer Petitioners immediately notified the Eastern District of Wisconsin of this ruling by the Western District of Missouri and requested dismissal of *Radmer II* based on the *res judicata* effect of that decision. App. 76-87. The Eastern District of Wisconsin refused to afford *res judicata* effect to the prior jurisdictional determination by the Western District of Missouri and rejected the Radmer Petitioners' jurisdictional challenges. App. 88-93.

The Radmer Petitioners then challenged AAL's petition to compel arbitration on several grounds, including lack of standing and the absence of an enforceable agreement to arbitrate. App. 14-36. On October 31, 2001, the Eastern District of Wisconsin rejected Petitioners' standing challenge, granted AAL's petition to compel arbitration, and ordered the parties to arbitration. *Id.* The Radmer Petitioners appealed this decision to the United States Court of Appeals for the Seventh Circuit, which affirmed the district court. App. 1-13.

The Seventh Circuit Decision

The Seventh Circuit first addressed Petitioners' jurisdictional challenges. The court rejected Petitioners' *res judicata* arguments, stating:

> The Missouri district court returned the case to state court because not every plaintiff satisfied § 1332(a)'s amount-in-controversy threshold. This remand, however, was not entitled to preclusive effect because it was unappealable under 28 U.S.C. § 1447(d). *See Benson v. SI Handling Sys.*, 188 F.3d 780, 783 (7th Cir. 1999). Moreover, the ruling was contrary to this circuit's precedent, which holds that when one named plaintiff meets the minimum amount-in-controversy threshold, a district court may exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) over the remaining plaintiffs' claims, even if their individual claims do not exceed that amount. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997).

App. 5-6.

The court then addressed Petitioners' assertion that the arbitration provision in the new dispute resolution process was procedurally and substantively unconscionable. The Seventh Circuit rejected Petitioners' claims of procedural unconscionability, upholding AAL's right to make retroactive changes to the terms of Petitioners' individual insurance contracts by changing the terms of the AAL bylaws which were incorporated into those contracts. App. 7-8.

The court also rejected Petitioners' claims of substantive unconscionability. However, the court analyzed Petitioners' lack of mutuality argument under principles of contract formation, concluding that mutuality of obligation was not required to have an enforceable contract. App. 8-9. The court determined that Petitioners' unconscionability challenges based on severe limitation of remedies and the denial of the right to proceed on a class-wide basis had

nothing to do with the issue of arbitrability, and that those challenges were for the arbitrator, and not the court, to decide. App. 9. The Seventh Circuit therefore affirmed the judgment of the district court. App. 1-13.

REASONS FOR GRANTING THE WRIT

I. An order remanding a case for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1447(c) is *res judicata* on the issue of subject matter jurisdiction.

A. There is a split in the circuits on the issue of the preclusive effect of an unappealable remand order.

The divergence of views that gave rise to the *res judicata* issue in this case stems from an inter-circuit disagreement over the underlying jurisdictional issue. The two federal district courts which ruled on the jurisdictional issue in this case – one in the Eighth Circuit and one in the Seventh Circuit – disagree about whether plaintiffs' claims may be aggregated to satisfy the 28 U.S.C. § 1332 amount-in-controversy requirement and whether a court may exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over class members who cannot satisfy the $75,000 amount-in-controversy requirement. Each view represents a different interpretation of whether this Court's mandate in *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973) (that each class member must independently satisfy the jurisdictional amount-in-controversy) was superseded by the enactment of 28 U.S.C. § 1367.

In *Radmer I*, the Honorable Gary Fenner of the Western District of Missouri decided that *Zahn* was not overruled by 28 U.S.C. § 1367.[1] Judge Fenner held that plaintiffs' claims could not be aggregated to satisfy 28 U.S.C. § 1332 and that the court could not exercise supplemental jurisdiction pursuant to § 1367 over class members who could not satisfy the $75,000 amount-in-controversy requirement. Judge Fenner therefore remanded the case to the Circuit Court of Jackson County, Missouri. App. 74.

In *Radmer II*, the Honorable Myron Gordon of the Eastern District of Wisconsin, after being notified of the jurisdictional determination and ruling by the Western District of Missouri, declined to afford that ruling any *res judicata* effect. Judge Gordon relied on *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 607 (7th Cir. 1997) to conclude that, once a named plaintiff satisfies the jurisdictional minimum, a court may exercise supplemental jurisdiction under § 1367 over the remaining class members, even if their individual claims do not exceed the jurisdictional minimum. App. 90. Judge Gordon consequently held that the Eastern District of Wisconsin

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[1] This Court's per curiam, 4-4 summary disposition in *Free v. Abbott Laboratories, Inc.*, 529 U.S. 333 (2000) affirmed the Fifth Circuit Court of Appeals' ruling which included the conclusion that the Judicial Improvements Act of 1990 authorized the exercise of supplemental jurisdiction over unnamed class members even though they did not meet the 28 U.S.C. § 1332 amount-in-controversy requirement, but this Court never addressed the merits of the issue, did not resolve the circuit split of authority, and did not overrule *Zahn*. App. 59-75. It is not necessary for the court to revisit *Zahn* in this case because the correctness of the judgment from the Western District of Missouri is not relevant to *res judicata* analysis.

had subject matter jurisdiction over one named plaintiff pursuant to § 1332, and over the remaining parties pursuant to § 1367.

In reaching this conclusion, the Eastern District of Wisconsin acknowledged that the prior ruling of the Western District of Missouri addressed the identical issue and involved the identical parties; but the court rejected Petitioners' arguments that the decision of the Western District of Missouri was *res judicata* on the issue of subject matter jurisdiction, citing *Benson v. SI Handling Systems, Inc.*, 188 F.3d 780 (7th Cir. 1999) and *Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703 (7th Cir. 1999). *Benson* and *Health Cost Controls* both held that an unappealable remand order issued under § 1447(c) has no preclusive effect. App. 91. The Seventh Circuit affirmed the ruling of the Eastern District of Wisconsin. App. 6.

The Seventh Circuit's decision in this case, and its prior rulings in *Benson* and *Health Cost Controls*, are in direct conflict with a decision of the Fifth Circuit Court of Appeals addressing the same issue. In *Napper v. Anderson, Henley, Shields, Bradford and Pritchard*, 500 F.2d 634, 636-37 (5th Cir. 1974), the Fifth Circuit held that as between two federal district courts, the inability to appeal from a remand order does not permit the issue which has been actually litigated and determined in one federal court to be re-litigated in a second action.

The divergence of views represented by the Seventh Circuit in *Hawkins II*, *Benson*, and *Health Cost Controls*, and the Fifth Circuit in *Napper* raises the question of the scope of *Johnson Steel Street-Rail Co. v. Wharton*, 152 U.S. 252 (1894), which held that *res judicata*, as applied to the judgments of courts of general jurisdiction, does not

depend on the existence or non-existence of a right to have the judgment in the earlier suit re-examined on appeal or writ of error. *Id.* at 261. Has *Johnson* been nullified or limited by the operation of 28 U.S.C. § 1447(d)? According to *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 400-01 (1981) and *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950) the preclusive effect of a judgment is not negated by a conscious decision not to appeal, or because an appeal can be dismissed or mooted. Is there, nevertheless, a difference in a case such as this where the right to appeal has been precluded by Congress?

The ruling given *res judicata* effect in *Johnson* did not involve a jurisdictional determination. Although this Court has stated that jurisdictional determinations are subject to *res judicata*, none of the cases have involved an unappealable remand order. *See, e.g., Willy v. Coastal Corp.*, 503 U.S. 131, 137 (1992); *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Co.*, 455 U.S. 691, 706 (1982); *Durfee v. Duke*, 375 U.S. 106, 112 (1963); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78 (1939); *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938). This Court has not considered the effect, if any, of 28 U.S.C. § 1447(d) on the preclusive effect of a remand decision.

The Restatement (Second) of Judgments § 28(1) (1982) states:

> § 28 Exceptions to the General Rule of Issue Preclusion
>
> Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action

> between the parties is not precluded in the following circumstances:
>
> (1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action.

This Court discussed this Restatement section in *Standefer v. United States*, 447 U.S. 10, 23 (1980), but has not yet decided whether the exception in section 28(1) applies to cases of unappealable remand decisions. The Fourth Circuit, in *Nutter v. Monongahela Power Company*, 4 F.3d 319 (4th Cir. 1993), relied in part on *Standefer* in concluding that the district court's jurisdictional findings incident to remand did not have any preclusive effect. According to *Nutter*:

> Of the circuits that have addressed this issue, four have concluded that a district court's findings incident to an order of remand have no preclusive effect. *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1347-50 (6th Cir. 1993); *Soley [v. First Nat'l Bank of Commerce]*, 923 F.2d [406,] 409 (5th Cir. [1991]); *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989); *see Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539, 1540-41 (11th Cir. 1986) (per curiam).

4 F.3d at 322.

The Third Circuit also has endorsed the principle of Restatement § 28(1) that an unreviewable decision is not entitled to *res judicata* effect. *Greenleaf v. Garlock, Inc.*, 174 F.3d 352, 360 (3d Cir. 1999). Other circuits have adopted the contrary view that a decision retains its preclusive effect despite the inability to appeal, relying on

Johnson. Winters v. Lavine, 574 F.2d 46, 62 (2d Cir. 1978); *Ex parte Lennon*, 64 F. 320, 322 (6th Cir. 1894), *aff'd*, 166 U.S. 548 (1897). *See also Kronheim & Co., Inc. v. District of Columbia*, 91 F.3d 193, 211 (D.C. Cir. 1996) (Henderson, J., dissenting).

District Courts have ventured into this area as well. In *City Capital Resources, Inc. v. White*, 29 F.Supp.2d 334, 336 (S.D. W.Va. 1998), the district court held that direct estoppel prevents one court from reconsidering or relitigating a jurisdictional issue that has already been decided by another court. The *White* court went on to observe that the prior ruling was *res judicata* even if the first judgment may have been erroneous since, if a subsequent district court were allowed to review the correctness of an earlier district court's decision, it would be called upon to sit in an appellate capacity over the first district court, which it could not do. *Id.* at 336-37; *see also State ex rel. Salazar v. Ace Cash Express, Inc.*, 188 F.Supp.2d 1282, 1285-86 (D. Colo. 2002) (the doctrine of collateral estoppel precluded re-litigation of an identical removal issue previously rejected by another federal court).

B. The issue presented by the conflict is of great practical importance to the proper functioning of the federal judiciary and calls for the exercise of this Court's supervisory power.

Whether an unappealable remand order is entitled to *res judicata* effect is an important question of federal law that has not been settled by this Court. Congress prescribed removal procedures with the enactment of 28 U.S.C. § 1441, et seq. Congress explicitly precluded appellate review of remand decisions under 28 U.S.C. § 1447(d).

Congress's purpose in enacting § 1447(d) was to "prevent delay in the trial of remanded cases by protracted litigation of jurisdictional issues." *Sheet Metal Workers' Int'l Ass'n v. Carter*, 450 U.S. 949, 952 (1981) (Rehnquist, J., dissenting).

However, the direct consequence of denying preclusive effect to § 1447(c) remand decisions is exactly the opposite: unnecessary, duplicative litigation designed to obtain multiple bites at the apple. This case presents a clear example of the counter-productive and divisive consequences of denying preclusive effect to a § 1447(c) remand order. AAL chose to remove *Radmer I* to the Western District of Missouri. The Western District of Missouri was the first federal court to address the jurisdictional issue. After it removed the case to the Western District of Missouri, AAL then filed a petition to compel arbitration in the Eastern District of Wisconsin, a venue it presumably perceived as more favorable to its interests.

The Western District of Missouri fully considered the parties' arguments and determined that the requirements of 28 U.S.C. § 1332 had not been satisfied. Petitioners advised the Eastern District of Wisconsin of the ruling and demonstrated that the elements of *res judicata* had been satisfied. App. 76-87. AAL did not contest that the issues and parties were identical, or that it had had a full and fair opportunity to litigate the issue. Rather, it argued that because Seventh Circuit law applicable to the jurisdictional issue was different from the law of the Eighth Circuit, which had been applied by the Western District of Missouri, the Eastern District of Wisconsin was not bound by that decision. The Eastern District of Wisconsin and the Seventh Circuit agreed.

C. The court below erred in holding that a § 1447(c) remand order is not entitled to preclusive effect because it is unappealable.

The Seventh Circuit was incorrect in its two-part assessment of the jurisdictional issue. The decision of the Western District of Missouri was entitled to preclusive effect, despite the unappealability of that decision under § 1447(d). The notion that an unappealable ruling is not entitled to *res judicata* effect has not been endorsed by this Court or by Congress. Although the concept, as set forth in the Restatement (Second) of Judgments § 28(1), was referred to this Court in *Standefer*, *supra*, it has not been adopted as law. Indeed, in *Standefer*, this Court said, after referring to the Restatement (previous section number 68.1), "this is not to suggest that the availability of appellate review is always an essential predicate of estoppel." 447 U.S. at 23 n.18. This Court's decisions from *Johnson*, continuing through *Moitie* and *Munsingwear*, *supra*, lead to the inexorable conclusion that a judgment is not to be denied preclusive effect merely because it could not be appealed.

The second prong of the Seventh Circuit's rejection of the ruling by the Western District of Missouri – that it was contrary to Seventh Circuit precedent – bespeaks a parochialism that has no place in a *res judicata* analysis. It is immaterial that the Seventh Circuit would have decided the issue differently from the courts in the Eighth Circuit. Once an issue is decided by a federal court to which it has properly been presented, the determination of that issue is *res judicata*. The *res judicata* effect of the judgment is not dependent on the agreement of subsequent courts with the judgment that was reached. Such a rule would eviscerate the notion of *res judicata*, open the courts to unnecessary, repetitive litigation, and encourage forum shopping.

This case presents a clear example of forum shopping and a waste of judicial resources. There is undeniably a split in the circuits concerning the interpretation of § 1332's amount-in-controversy requirement and whether § 1367 has superseded *Zahn*. Once one federal court has decided the issue, applying the applicable law in that circuit, however, the losing party should not be allowed to keep retrying the issue in different circuits until the desired result is obtained. If the Seventh Circuit's decision is allowed to stand, and if the Western District of Missouri's remand order under § 1447(c) is not given preclusive effect, litigants will be encouraged to protract the judicial process by seeking out successive fora until a favorable outcome is achieved.

As Chief Justice Rehnquist observed in his dissent from the denial of certiorari in *McCarren v. Town of Springfield*, 464 U.S. 942, 945 (1983):

> At a time when judges and observers are increasingly concerned with the workload of the federal courts, the application of principles of res judicata to disputes such as this might both conserve the time of the federal courts and make for a more orderly resolution of this and similar disputes.

Petitioners believe that this Court's decision in *Johnson* applies in this case and that the preclusive effect of the Western District of Missouri's remand order was improperly denied.[2] Certiorari should be granted to make

[2] *Johnson*, though vintage, has been cited by several courts, including this Court in *Standefer, supra*. Interestingly, the response of the court in the Eastern District of Wisconsin to Petitioners' reliance on

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clear that § 1447(c) remand orders are entitled to preclusive effect.

II. The determination of whether an arbitration clause is unconscionable and therefore unenforceable is a gateway dispute that raises a question of arbitrability for a court, not an arbitrator, to decide.

The Seventh Circuit also held that Petitioners' unconscionability challenges based on the unavailability of attorney's fees and punitive damages and the prohibition of class actions must be decided by the arbitrator:

> [E]ven though Appellants are correct that the arbitration procedures established by AAL do not provide for the recovery of attorney's fees or punitive damages, complaints about the unavailability of such remedies first must be presented to the arbitrator. In analyzing a motion to compel arbitration, courts must consider only the issues relating to arbitrability. *We Care Hair Dev., Inc. v. Engen*, 180 F.3d 838, 844 (7th Cir. 1999). "Once the court determines that an arbitration clause is

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Johnson was to state: "The Radmer respondents reply that [*Benson* and *Health Cost Controls*] contradict *Johnson Steel Street-Rail Co. v. Wharton*, 152 U.S. 252 (1894), but I may not disregard the seventh circuit's recent on-point rulings in favor of such an old case." App. 91. The district court's preference for "recent" Seventh Circuit rulings in the face of contrary, but "old" Supreme Court authority disregards the lesson of *Rodriguez v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989): "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

> enforceable, the status of the other contract terms is for the arbitrator to decide." *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-04 (1967)). Because the adequacy of arbitration remedies has nothing to do with whether the parties agreed to arbitrate or if the claims are within the scope of that agreement, these challenges must first be considered by the arbitrator. . . . The same reasoning applies to Appellants' complaint that they are prohibited from proceeding in arbitration as a class.

App. 9-10 (citations omitted).

The Seventh Circuit's delegation to the arbitrator of the responsibility for determining whether the limitation of remedies and the prohibition of class actions in an arbitration agreement are unconscionable circumvents this Court's mandate in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). The opinion also conflicts with this Court's recent decision that the question of whether the parties are bound by an arbitration agreement is a "gateway dispute" to be resolved by a court, not an arbitrator. *Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588 (2002). The adequacy of available remedies bears directly on whether an arbitration agreement is unconscionable and therefore unenforceable. This Court held in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) that generally applicable contract defenses – such as unconscionability – may render an arbitration agreement unenforceable. If unconscionability makes an arbitration agreement unenforceable, there is no agreement to arbitrate. Contrary to the view of the Seventh Circuit that "adequacy of arbitration remedies has nothing to do with [arbitrability]," Petitioners' challenges to the unconscionability of the arbitration

provision have everything to do with whether there is an enforceable agreement to arbitrate. App. 9.

The Seventh Circuit is not alone in its erroneous view that the question of arbitrability does not encompass unconscionability defenses to the overall enforceability of the agreement. The Seventh Circuit followed the Third Circuit and Eighth Circuit down a path which not only diverges from this Court's rulings above, but also from this Court's holding in *Doctor's Associates* that generally applicable contract defenses such as unconscionability may render an arbitration agreement unenforceable. These decisions also run afoul of this Court's admonition in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942-43 (1995) that the arbitrability of a dispute should never be assumed to be for the arbitrator unless the parties have evinced a clear and unmistakable intent in that regard. *See Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1086-87 (8th Cir. 2001) (reversing district court and holding that a limitation on damages, which district court held rendered the arbitration agreement unenforceable, was issue for an arbitrator, not a court); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 230 (3d Cir. 1997) (issues such as limitation-of-remedies and waiver of a jury trial, which had been argued to render an arbitration agreement unenforceable, were for an arbitrator, noting that the only issues a court should decide are those that are "essential to defining the nature of the forum in which a dispute will be decided").

The Seventh Circuit's decision herein, along with *Great Western* and *Larry's United Super*, conflicts with two recent decisions of the Ninth and Third Circuits. Both the Ninth and Third Circuits considered unconscionability analysis as a gateway dispute for the court, not the

arbitrator, including the prong of the analysis in which the court addresses the remedies available in arbitration to determine if the agreement is substantively unconscionable. *See Alexander v. Anthony Int'l v. L.P.*, 341 F.3d 256, 264-70 (3d Cir. 2003);[3] *Ting v. AT&T*, 319 F.3d 1126, 1148-49 (9th Cir. 2003), *cert. denied*, 2003 WL 1988529 (Oct. 6, 2003).

The Seventh Circuit's decision espouses a legal principle that effectively precludes a party from obtaining a judicial determination of unconscionability. The decision therefore threatens to undermine the bedrock principle on which the FAA is grounded: that arbitrability "is a matter of consent, not coercion." *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 479 (1989).

This bedrock principle was recently reaffirmed by this Court in *Howsam*. There, this Court reaffirmed that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit." *Howsam*, 123 S. Ct. at 591 (quoting *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960) and citing *First Options of Chicago, Inc.*,

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[3] Indeed *Alexander* exposes that, in addition to a conflict among the circuits, there is conflict within the Third Circuit on this issue. In *Alexander*, the court noted that the party seeking to enforce the arbitration agreement contested the ability of the district court to consider any challenge to the arbitration agreement on unconscionability grounds. 341 F.3d at 264. The Third Circuit then noted its earlier holding in *Great Western* that the arbitrator must address whether the arbitration agreement involves a waiver of substantive rights. Making clear its disagreement with *Great Western*, the court stated, "[b]ut a court, before directing the parties to proceed with this favored method of dispute resolution, must still ascertain whether the parties entered a valid agreement to arbitrate." *Id.* (citations omitted).

514 U.S. at 942-43). This Court reiterated that "[t]he question whether the parties have submitted a dispute to arbitration, *i.e.*, the '*question of arbitrability*,' is 'an issue for judicial determination [u]nless the parties clearly and unmistakably provide otherwise.'" *Howsam*, 123 S. Ct. at 591 (quoting *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 649 (1986) and *First Options*, 514 U.S. at 944) (emphasis and alteration in original).

Although this Court noted that the phrase "question of arbitrability" has a limited scope, it unequivocally reaffirmed that the phrase is applicable – and the determination is for the court, not the arbitrator – in a dispute, such as the one at issue here, regarding whether an arbitration clause is valid and binding. *Howsam*, 123 S. Ct. at 592; *see also Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402, 2407 (2003) (affirming that disputes for the court to decide are those that involve whether the "parties have a valid arbitration agreement at all").

Courts should not assume that parties agreed to arbitrate the issue of arbitrability unless there is "'clea[r] and unmistakabl[e]' evidence that they did so." 514 U.S. at 944 (quoting *AT&T Technologies*, 475 U.S. at 649). According to the Court, in this way,

> the law treats silence or ambiguity about the question '*who* (primarily) should decide arbitrability' differently from the way it treats silence or ambiguity about the question '*whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement' – for in respect to this latter question the law reverses the presumption.

First Options, 514 U.S. at 944-45 (citations omitted).

If these principles are to have any meaning, this Court should grant this petition. The Seventh Circuit essentially ruled that the question of whether the arbitration agreement at issue here was substantively unconscionable must "first be presented to the arbitrator." App. 9. In so holding, the Seventh Circuit has effectively parsed the unconscionability defense out of existence. This is contrary to the language and spirit of the FAA as that statute has been interpreted by this Court.

The FAA provides that written arbitration provisions are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. This Court has repeatedly reaffirmed the principle that "generally applicable contract defenses, such as fraud, duress or unconscionability, may be applied to invalidate arbitration agreements without contravening" section 2 of the FAA. *Doctor's Associates*, 517 U.S. 687 (citations omitted). This Court has stated that courts must "remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds for the revocation of any contract." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985) (quotation omitted).

Unconscionability provides a defense to the enforcement of an arbitration agreement.[4] Although the

[4] In *Perry v. Thomas*, 107 S. Ct. 2520, 2527, n.9 (1987), this Court declined to address whether the agreement was in fact an unconscionable, unenforceable contract of adhesion because the issue had not been

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unconscionability defense is analyzed under state common law, courts generally recognize that the doctrine of unconscionability involves both "procedural" and "substantive" elements. *See, e.g.*, *Alexander*, 341 F.3d at 264 (applying law of the Virgin Islands); *Ting*, 319 F.3d at 1148-49 (applying California law); *Harris v. Green Tree Fin. Corp.*, 183 F.3d 173, 181 (3d Cir. 1999) (applying Pennsylvania law). Procedural unconscionability pertains to the process by which an arbitration agreement is reached; the factors bearing on meeting of the minds. *See Discount Fabric House of Racine, Inc. v. Wisconsin Tel. Co.*, 345 N.W.2d 417, 425 (Wis. 1984); *see also Harris*, 183 F.3d at 181 (citing E. Allen Farnsworth, *Contracts*, § 4.28 (2d ed. 1990)). The fact that a contract is one of adhesion generally satisfies the element of procedural unconscionability. *Alexander*, 341 F.3d. at 265.

But even with a contract of adhesion, a party seeking to show that an arbitration provision is unenforceable because it is unconscionable must show "substantive unconscionability." In other words, the party claiming unconscionability also must show that the terms of a contract of adhesion are unreasonable. *Discount Fabric House*, 345 N.W.2d at 425. According to the commentary accompanying § 208 of the Restatement (Second) of Contracts:

> [G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or

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decided below, but suggested that the issue could be considered on remand.

> compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms.

Restatement (Second) of Contracts § 208 cmt. d. (1979).

Here, Petitioners claimed that the arbitration clause itself, not their contracts for life insurance, had "terms unreasonably favorable to the stronger party" and "involved elements of deception or compulsion" and was therefore unenforceable. Their claim was based on both the unfair terms and the elements of compulsion involved when the arbitration agreement was forced on them retroactively. Although the Seventh Circuit cited *Prima Paint* to support its ruling that complaints about the unfairness of an arbitration clause were for the arbitrator, particularly with respect to limitation of remedies, *Prima Paint* holds the opposite: "Accordingly, if the claim is fraud in the inducement of the arbitration clause itself – an issue which goes to the 'making' of the agreement to arbitrate – the federal court may proceed to adjudicate it." *Prima Paint*, 388 U.S. at 403-04. This petition should be granted on this issue.

III. AAL did not have standing to assert a claim under the Federal Arbitration Act.

As indicated above, the jurisdiction of the District Court for the Eastern District of Wisconsin was invoked by AAL when, rather than filing a breach of contract counterclaim against the Radmer Petitioners in the *Radmer I* action commenced in the Circuit Court of Jackson County, Missouri (which AAL had removed to the Western District of Missouri), AAL sued the Radmer Petitioners in the

United States District Court for the Eastern District of Wisconsin to compel arbitration. In its lawsuit, AAL claimed that the Wisconsin federal court should compel arbitration because the Radmer Petitioners were bound by a "broad mandatory arbitration provision" under which "arbitration is '**the sole means**' for AAL members to present and resolve disputes" regarding their insurance policies. App. 94-100 (emphasis and quotation marks in original).

AAL claimed it was entitled, pursuant to the FAA, to an order compelling the Radmer and Hawkins Petitioners to arbitrate their disputes with AAL. *Id.* The district court granted AAL's petition and ordered Petitioners to "proceed to arbitration in accordance with the terms of their agreement, and to proceed no further on these issues in any other trial court pending completion of arbitration." (App. 34.) The district court rejected as "novel" Petitioners' argument that because arbitration is not, in fact, the "**sole means**" for resolving disputes but rather the last step in AAL's three-step dispute resolution process, AAL did not have standing and the district court lacked the power under the FAA to compel arbitration. (App. 32-33.) (emphasis in original).

Petitioners submit that AAL did not have standing to compel arbitration. Federal jurisdiction is limited by Article III, section 2, of the Constitution to actual cases and controversies. Therefore, a plaintiff's standing to sue "is the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). To satisfy Article III's standing requirements,

> a plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc., 528 U.S. 167 (2000); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This triad of injury in fact, causation, and redressability constitutes the core of the Constitution's case or controversy requirement, and the party invoking federal jurisdiction must establish its existence. *Steel Co. v. Citizens For A Better Envt.*, 523 U.S. 83, 103-04 (1998).

Here, AAL, the drafter of the dispute resolution process, which was indisputedly imposed on Petitioners via an after-the-fact retroactive amendment to AAL's bylaws, chose to require two separate steps before arbitration can be compelled. Step 1 is "Appeal." Step 2 is "Mediation." (App. 126-128.) At least two federal circuit courts of appeal have held that when contracting parties condition an arbitration agreement on the satisfaction of a condition precedent, the failure to satisfy the condition precludes the parties from compelling arbitration and staying court proceedings under the FAA. *See HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41, 44 (1st Cir. 2003); *Kemiron Atlantic, Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287, 1291 (11th Cir. 2002).

Virtually every time this Court has interpreted an arbitration agreement, it has held steadfast to the proposition that the intent of the contracting parties is

paramount and can trump the FAA's policy in favor of arbitration. *See, e.g., Mastrobuono v. Shearson Lehman Hutton*, 514 U.S. 52, 57 (1995), *E.E.O.C. v. Waffle House, Inc.*, 122 S. Ct. 754, 764 (2002). Here, AAL is the only party whose "intent" with regard to arbitration can be gleaned as Petitioners did not see, comment on, and certainly did not approve the retroactive bylaw change requiring arbitration. AAL made clear that its intent was to make arbitration the "resolution mechanism of last resort" as in *Kemiron*, 290 F.3d at 1291. The arbitration step of AAL's dispute resolution process has not been activated and the FAA does not apply. *Id.* Thus, AAL did not have standing to commence a separate action against Petitioners.

Nor does AAL have standing to bring a lawsuit under the FAA on the grounds that Petitioners commenced a lawsuit in purported violation of the dispute resolution process. AAL's sole recourse was to bring a breach of contract counterclaim in *Radmer I*, seeking an injunction compelling Petitioners to proceed through the steps of the dispute resolution process. Presumably, if Petitioners had wished to proceed directly to arbitration and skip steps 1 and 2 of the dispute resolution process, they would not have been entitled to an order compelling AAL to do so. Similarly, AAL had no standing to invoke the FAA.

With steps 1 and 2 still left untaken, the right to and need for arbitration is speculative and conjectural. Until the first two steps are completed, the possibility of arbitration does not even present itself. If the Missouri court in *Radmer I* were to determine that the dispute resolution process is unenforceable, as Petitioners contend, step 3 of that invalidated process would be moot. Alternatively, should that court decide Petitioners are required to comply

with the three-step process, that process would need to play out through the first two steps before arbitration is even arguably implicated. Resolution of the dispute could occur in steps 1 or 2, again making step 3 moot.

AAL has not suffered an injury-in-fact because its hypothetical right to arbitration has not arisen under the terms of its own bylaws. At this stage, arbitration is speculative and conjectural. Under the limitations on federal jurisdiction imposed by Article III, the district court did not have jurisdiction over AAL's purely speculative claim to compel arbitration.

The court should grant certiorari because the Seventh Circuit's unusually broad and novel view of standing impermissibly expands the scope of the FAA to encompass premature claims which have not yet progressed to the arbitration stage of the prescribed dispute resolution process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In the
United States Court of Appeals
For the Seventh Circuit

Nos. 01-4124, 01-4147 & 01-4148

GLENN A. HAWKINS and NEDRA J. HAWKINS,

Plaintiffs-Appellants,

v.

AID ASSOCIATION FOR LUTHERANS,

Defendant-Appellee.

AID ASSOCIATION FOR LUTHERANS,

Plaintiff-Appellee,

v.

MARTIN F. RADMER, et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Eastern District of Wisconsin.
Nos. 00-C-1327 & 99-C-1205 –
Charles N. Clevert, Jr., *Judge*.

ARGUED MAY 30, 2002 – DECIDED AUGUST 5, 2003

Before FLAUM, *Chief Judge*, and HARLINGTON WOOD, JR., and MANION, *Circuit Judges*.

FLAUM, *Chief Judge*. Three groups of plaintiffs filed putative class actions against Aid Association for Lutherans ("AAL"), a fraternal benefit society that provides them with life insurance, alleging that AAL engaged in fraudulent sales

practices. These policyholders want their claims resolved in a judicial forum, but a federal district court ordered them to arbitration. We affirm.

I. BACKGROUND

Located in Appleton, Wisconsin, AAL is a fraternal benefit society, *i.e.*, a nonprofit, nonstock, membership organization with a representative governing system, *see* Wis. Stat. § 614.01, that provides life insurance and other benefits to its members. Like other fraternal benefit societies, AAL is not regulated by the same laws as commercial insurance companies. Instead, every state, including Wisconsin, has a regulatory scheme that governs these organizations based on a Model Fraternal Code. *See id.* §§ 614 *et seq.*, 632 *et seq.* While commercial insurers utilize "closed" contracts, *i.e.*, self-contained agreements with set terms, fraternal benefit societies employ "open" contracts. Open contracts are memorialized by the member's application, the insurance certificate, and the society's articles of incorporation and bylaws. Central to this dispute, open contracts also explicitly recognize that the articles of incorporation and bylaws are subject to change, and that any subsequent amendment to them is incorporated into the preexisting open contract as long as it does not destroy or diminish the benefits promised in the original contract. *See id.* § 632.93(1)-(2). As required by Wisconsin law, AAL's life insurance contracts specify that AAL's articles of incorporation and bylaws are part of the agreement and state explicitly that any subsequent amendments to the bylaws are binding on the policyholder.

When the plaintiffs purchased their policies, AAL's bylaws did not prescribe a means for resolving disputes. In

March 1999, however, AAL's Board of Directors amended the organization's bylaws to include a mandatory arbitration provision. Under the amended bylaws, binding arbitration is the sole means to resolve any dispute with AAL. The arbitration program has three steps. If the first two steps ("appeal" and "mediation") fail, the parties proceed to binding arbitration in accordance with American Arbitration Association ("AAA") rules. AAL pays the costs of arbitration, but does not pay for the member's attorney's fees.

In April 1999 AAL filed its amended bylaws with the Wisconsin Commissioner of Insurance pursuant to Wis. Stat. § 614.12(4). It also filed certified copies of the amended bylaws with the requisite government department in each of the plaintiffs' home states. In May 1999 AAL published a brief synopsis of the new mediation program in *Correspondent,* its official publication.

In August 1999 Martin Radmer and three other policyholders (the "Radmer plaintiffs") filed a class action against AAL in Missouri state court, alleging that AAL had engaged in illegal churning by encouraging them to borrow against their current policies to purchase new ones to their detriment. *See IDS Life Ins. Co. v. Royal Alliance Assocs., Inc.,* 266 F.3d 645, 652 (7th Cir. 2001). AAL removed the case on diversity grounds, 28 U.S.C. § 1332, but a federal district court in Missouri remanded the case to state court because not every plaintiff satisfied the amount-in-controversy requirement. In October 1999 AAL filed a petition in a federal district court in Wisconsin to compel the Radmer plaintiffs to arbitrate their claims pursuant to the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.* ("FAA"). The Radmer plaintiffs filed a motion to dismiss for lack of jurisdiction, which the court denied.

In November 1999 another policyholder, Charles Sattler, filed his own class action (the "Sattler plaintiffs") in Illinois state court, asserting similar allegations against AAL. AAL removed the case to a federal district court in Illinois, and then amended its petition in the Eastern District of Wisconsin, which sought to compel the Radmer plaintiffs to arbitrate, to include the Sattler plaintiffs. The federal district court in Illinois then transferred the Sattler plaintiffs' action to the federal district court in Wisconsin under 28 U.S.C. § 1404(a).

In July 2000 AAL was sued again, this time by policyholders Glenn and Nedra Hawkins (the "Hawkins plaintiffs"), who filed a class action in Indiana state court that was similar to the suits filed by the Radmer and Sattler plaintiffs in Missouri and Illinois. AAL removed the case to federal district court in Indiana. The Hawkins plaintiffs challenged removal, but the district court denied their motion and transferred the case under § 1404(a) to the Eastern District of Wisconsin. AAL then moved to compel the Hawkins plaintiffs to arbitrate.

The district court in Wisconsin ultimately granted AAL's petitions to compel arbitration of the Radmer, Sattler, and Hawkins plaintiffs' claims. The court also dismissed without prejudice the underlying complaints filed by the Sattler and Hawkins plaintiffs, ordering the parties to take no further action in any court until the completion of arbitration. In response, the Missouri state court then stayed the underlying Radmer case. This court consolidated the appeals of all plaintiffs.

II. Discussion

A. Jurisdiction

Appellants first challenge the federal court's subject matter jurisdiction. The Hawkins plaintiffs assert that the district court did not have jurisdiction under 28 U.S.C. § 1332(a)(1) because their claims did not exceed $75,000. The court believed that the amount-in-controversy threshold had been met because the value of the Hawkins plaintiffs' policies surpassed $75,000, but the Hawkins plaintiffs insist this was error because they are not seeking the full cash value of the policies. We agree with the district court. The Hawkins plaintiffs are not only seeking money damages, but are also attacking the validity of their policies by seeking to nullify the arbitration provisions and to enjoin AAL from cancelling policies of class members who fail to pay premiums. And as AAL correctly points out, when the validity of a policy (as opposed to the insurer's obligation to pay) is in dispute, the face value of that policy is a proper measure of the amount-in-controversy. *Keck v. Fid. & Cas. Co. of N.Y.*, 359 F.2d 840, 841 (7th Cir. 1966). *See also Budget Rent-A-Car, Inc. v. Higashiguchi*, 109 F.3d 1471, 1473 (9th Cir. 1997); *Guardian Life Ins. Co. of Am. v. Muniz*, 101 F.3d 93, 94 (11th Cir. 1996); *Mass. Cas. Ins. Co. v. Harmon*, 88 F.3d 415, 416 (6th Cir. 1996). Accordingly, we find that the court had subject matter jurisdiction to compel the Hawkins plaintiffs to arbitration.

Next, the Radmer plaintiffs assert that the district court did not have subject matter jurisdiction over their claims because it was required to give preclusive effect to the Missouri district court's prior remand. The Missouri district court returned the case to state court because not every plaintiff satisfied § 1332(a)'s amount-in-controversy

threshold. This remand, however, was not entitled to preclusive effect because it was unappealable under 28 U.S.C. § 1447(d). *See Benson v. SI Handling Sys.*, 188 F.3d 780, 783 (7th Cir. 1999). Moreover, the ruling was contrary to this circuit's precedent, which holds that when one named plaintiff meets the minimum amount-in-controversy threshold, a district court may exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) over the remaining plaintiffs' claims, even if their individual claims do not exceed that amount. *See In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997).

B. Arbitrability

We now turn to the central controversy of this case – whether the district court erred by ordering Appellants to submit their claims to arbitration. We review *de novo* the court's decision to compel arbitration based on its finding that the parties entered into an enforceable agreement. *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997). Federal policy strongly favors arbitration, as embodied in the FAA. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 662 (7th Cir. 2002). Arbitration is a matter of contract – no party can be required to arbitrate a claim if they have not agreed to do so. *Harter v. Iowa Grain Co.*, 220 F.3d 544, 553 (7th Cir. 2000). Whether the parties agreed to arbitrate is a matter of state contract law. *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 733 (7th Cir. 2002). Here, we look to Wisconsin law because the district court applied it below, a decision unchallenged by the parties on appeal. *See*

Kritikos v. Palmer Johnson, Inc., 831 F.2d 418, 421 (7th Cir. 1987).

1. Unconscionability

Appellants' primary argument is that the arbitration provision is unconscionable and therefore invalid. Specifically, they complain that they should not have to arbitrate their claims because they had no opportunity to review, negotiate, or comment on the AAL Board's mediation program. But unlike policyholders of private insurance companies, members of fraternal benefit societies expressly delegate decision-making power to their elected representatives:

> As long as he remains a member, the terms of his membership, including obligations and benefits relating to the insurance funds of the society, are subject to change without his individual consent. The control over those terms is vested by him and his fellow members in the elected representative government of their society as authorized and regulated by the law of [the State].

Order of United Commercial Travelers of Am. v. Wolfe, 331 U.S. 586, 606 (1947). Appellants here did not buy insurance from a private insurance carrier; they instead chose to become AAL members and entered into the type of open contract associated with fraternal benefit societies and required by Wisconsin law. *See* Wis. Stat. § 632.93(1)-(2). And in Wisconsin, agreements between a fraternal benefit society and its members include the society's bylaws, as well as any subsequent amendments, provided they do not destroy or diminish benefits promised in the policy. *Id.*

In this case Appellants do not even argue that the arbitration provision destroyed or diminished their benefits under the policy. Instead, they complain about losing their right to go to court. But Appellants cite no authority supporting the position that losing access to court destroys or diminishes the insurance benefits promised in the policy. Moreover, the preamendment version of the bylaws did not reserve the right to a judicial forum, it merely established a default limitations period for bringing suit. Accordingly, we agree with the district court that the AAL Board's decision to add the arbitration provision was permissible, and the fact that Appellants were not consulted is of no consequence. *See Geldermann, Inc. v. Commodity Futures Trading Comm'n,* 836 F.2d 310, 318 (7th Cir. 1987) (member who signed written agreement promising to abide by exchange rules and all subsequent amendments was bound by arbitration procedures later adopted by the exchange).

Appellants offer various other reasons why the arbitration provision is unfair. In their view, the arbitration clause is invalid because it requires certificate holders to arbitrate disputes against AAL, but does not require AAL to do the same. Under the modern rule of contract law, however, "mutuality of obligation" is unnecessary if the purported contract is supported by consideration. *Klug v. Flambeau Plastics Corp.,* 214 N.W.2d 281, 285-86 (Wis. 1974) (contract does not lack mutuality merely because every obligation of one party is not met by an equivalent counter obligation of the other; rather, mutuality means sufficient consideration so that one promise may support another); *see also Restatement (Second) of Contracts* § 79 (1979). Appellants cite no binding authority suggesting that the contracts at issue here require

mutuality of obligation in addition to consideration; therefore, their argument fails.

Appellants also contend that the arbitration provision is unconscionable because it limits the remedies available to them. Specifically, they complain that the clause is invalid because arbitration prohibits them from obtaining (1) injunctive relief, (2) compensatory damages, and (3) punitive damages and attorney's fees. Appellants' arguments are without basis. First, the AAL bylaws do not prohibit injunctive relief; indeed, the AAA Commercial Arbitration Rules empower the arbitrator to grant equitable relief. Second, the AAL bylaws specifically allow for the recovery of actual damages. And third, even though Appellants are correct that the arbitration procedures established by AAL do not provide for the recovery of attorney's fees or punitive damages, complaints about the unavailability of such remedies first must be presented to the arbitrator. In analyzing a motion to compel arbitration, courts must consider only the issues relating to arbitrability. *We Care Hair Dev., Inc. v. Engen,* 180 F.3d 838, 844 (7th Cir. 1999). "Once the court determines that an arbitration clause is enforceable, the status of the other contract terms is for the arbitrator to decide." *Id.* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 403-04 (1967)). Because the adequacy of arbitration remedies has nothing to do with whether the parties agreed to arbitrate or if the claims are within the scope of that agreement, these challenges must first be considered by the arbitrator. *See Boomer v. AT&T Corp.,* 309 F.3d 404, 418 n.18 (7th Cir. 2002); *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.,* No. 02-2323, 2003 WL 21498876, at *3 (8th Cir. July 1, 2003); *Musnick v. King Motor Co. of Fort Lauderdale,* 325 F.3d 1255, 1261 (11th

Cir. 2003); *Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88, 92 (1st Cir. 2002); *Great W. Mortgage Corp. v. Peacock*, 110 F.3d 222, 230-31 (3d Cir. 1997); *cf. Metro E. Ctr. v. Qwest Communications, Inc.*, 294 F.3d 924, 929 (7th Cir.) (FCC is proper forum (instead of district court) to consider lawfulness of tariff with fee-shifting provision, though arbitrator may play role as well), *cert. denied*, 123 S.Ct. 707 (2002). The same reasoning applies to Appellants' complaint that they are prohibited from proceeding in arbitration as a class. *See Boomer*, 309 F.3d at 418 n.18.

Appellants further contend that federal district court is the appropriate forum to lodge their "limitation of remedy" grievance, relying on *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). Their reliance is misplaced. According to Appellants, *Gilmer* mandates that arbitration procedures offer remedies similar to those available in a judicial forum. But Appellants are mistaken – *Gilmer* merely holds that litigants may not waive their right to a judicial forum if they are litigating *federal statutory* claims and if Congress has evinced its intention to preclude such a waiver for the statutory rights at issue. Appellants here, however, are pursuing only state common-law claims and so *Gilmer's* rule precluding waiver is not applicable.

Appellants next assert that AAL's arbitration provision is unconscionable because it is vague and arbitrary. According to Appellants, the provision is vague because it does not specify which set of AAA rules apply and it is arbitrary because the applicable AAA rules can be changed at any time. Appellants, however, failed to present these arguments to the district court; therefore they have waived them on appeal. *Grayson v. City of Chicago*, 317 F.3d 745, 751 (7th Cir. 2003).

Finally, Appellants complain that arbitration robs them of their right to a jury trial. Unfortunately for Appellants, there is no constitutional right to a civil jury trial outside of an Article III forum. *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 848-49 (1986); *Koveleskie v. SBC Capital Markets, Inc.,* 167 F.3d 361, 368 (7th Cir. 1999). By acquiescing to the terms and conditions of their open contract with AAL, Appellants waived their right to a trial by jury and agreed to resolve their dispute through AAA arbitration procedures instead.

2. Absence of Mutual Assent and Consideration

Appellants argue that they cannot be forced to arbitrate their claims because they did not assent to arbitration, nor did they provide any independent consideration for implementing the clause into their policies. But the addition of the arbitration provision was not an independent contract requiring mutual assent or consideration; rather, it was the policyholders' insurance contracts that created their obligations. *See Geldermann,* 836 F.2d at 318-19. And as discussed previously, these contracts explicitly bound Appellants to subsequent changes in AAL's bylaws. *See id.* Since these agreements were supported by ample consideration – the policyholders received life insurance coverage and access to other fraternal benefits provided by AAL – the district court correctly concluded that the insurance contracts are not invalid for lack of mutual assent and consideration.

3. Notice

Appellants next contend that the arbitration provision is invalid because the AAL failed to give proper notice of the amended bylaw. Section 26 of AAL's bylaws states that "all amendments to the Articles of Incorporation and Bylaws of the Association shall be published in *Correspondent* not later than four months after the date of filing such amendments with the Commissioner of Insurance of the State of Wisconsin." (App.113.) Although AAL did not publish the text of the amended bylaws, it did publish a timely synopsis of the new procedures, which the district court concluded was in substantial compliance with the bylaws. Disputes between a voluntary association and its members are governed by the law of contracts, with the bylaws creating legally enforceable obligations. *Austin v. Am. Ass'n of Neurological Surgeons,* 253 F.3d 967, 968 (7th Cir. 2001). And in contract law, substantial compliance with contractual duties is often compliance enough. *Employers Ins. of Wausau v. Browner,* 52 F.3d 656, 664 (7th Cir. 1995). Appellants cite no legal authority contradicting the district court's application of the general rule that substantial compliance is enough, nor do they explain how they were harmed by the notice provided. Therefore, we agree with the district court's conclusion that AAL's failure to publish the full text of the bylaw amendment should not invalidate the arbitration provision.

4. Failure to Comply With Missouri Law

Finally, the Sattler plaintiffs argue that AAL violated Missouri law by not obtaining preapproval of the insurance contracts from that state's director of insurance. But because this argument was never presented to the district court, it is now waived. *See Grayson,* 317 F.3d at 751.

Though Appellants present other contract defenses and jurisdictional arguments on appeal, these remaining issues are either undeveloped or frivolous and do not merit further discussion.

III. CONCLUSION

Because AAL is a fraternal benefit society, it is governed by different laws than private insurance companies. Accordingly, members who enter into insurance contracts with AAL are subject to its bylaws and any changes to those bylaws, provided such changes do not destroy or diminish the benefits promised. Appellants here agreed to be bound by these rules when they purchased insurance from AAL and therefore must accept the consequences of their agreements, including the requirement that they arbitrate their claims. The judgments of the district court are AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

AID ASSOCIATION FOR LUTHERANS,

Plaintiff,

v. Case No. 99-C-1205

MARTIN F. RADMER,
GERALD W. BREDENBERG,
JOANNE JUST,
CHRISTOPHER E. SCHROEDER,
CHARLES SATTLER,

Defendants.

ORDER GRANTING PETITION TO COMPEL ARBITRATION

(Filed Oct. 31, 2001)

On August 5, 1999, Martin Radmer, Gerald Bredenberg, Joanne Just, and Christopher Schroeder (hereinafter "Radmer respondents") filed a putative class action against Aid Association for Lutherans (hereinafter "AAL") in Missouri court, alleging that AAL engaged in fraudulent and deceptive marketing practices in connection with the respondents' life insurance contracts with AAL. Responding to the Radmer action, AAL filed this petition to compel arbitration on October 12, 1999, naming the Radmer respondents. Then, on November 2, 1999, Charles Sattler filed a putative class action in Illinois court based on claims similar to those in the Radmer action. AAL removed the Sattler action to federal court. The case was transferred to this district, and is now before this court in Case No. 00-C-260. After Sattler initiated his action in

Illinois, AAL amended its petition to name Sattler as an additional respondent. That petition to compel arbitration in the Radmer action in Missouri and in the Sattler action is ripe for decision. For the reasons stated below, the petition will be granted.

I. BACKGROUND

AAL is a fraternal benefit society chartered under Wisconsin law with a principal place of business in Appleton, Wisconsin. (Amended Petition ¶ 5; Answer ¶ 5) A fraternal benefit society is a non-profit membership organization with a representative form of government that provides life insurance. Wis. Stat. § 614.01. Respondent Martin F. Radmer is a resident and citizen of Missouri; respondent Gerald W. Brendneberg [sic] is a resident and citizen of Minnesota; respondent Joanne Just is a resident and citizen of North Dakota; and respondents Christopher E. Schroeder and Charles Sattler are residents and citizens of Illinois. Each respondent is a member of AAL and has a life insurance contract with AAL. (Petition § 6; Answer § 6; Sattler Response to Petition to Compel[1])

At Section 1.2, the life insurance policies issued by AAL to the respondents provide:

> The entire contract between you and AAL is made up of: [t]his certificate including any attached riders, endorsements or amendments;

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[1] The Answer was filed on behalf of the Radmer respondents. Sattler filed a separate brief in opposition which, together with the Elia Affidavit, are submitted as Sattler's response to the petition)

> [t]he attached application, including any application for increase in the specified amount; and [t]he AAL Articles of Incorporation and Bylaws. Any changes to the Articles of incorporation and Bylaws made after this certificate is issued will not reduce the benefits AAL promises to pay.

(Amended Petition ¶ 13; Memorandum in Support of Amended Petition, Ex. A; Sattler Response to Petition to Compel, Elia Affidavit in Support, Ex. A)[2]

On March 27, 1999, AAL's Board of Directors amended AAL's bylaws to provide for mandatory binding arbitration for member disputes with AAL. (Amended Petition ¶ 14; Sattler Response to Petition to Compel, Elia Affidavit in Support, Ex. B)[3] Prior to the amendment, AAL's bylaws did

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[2] The contracts cited are Radmer's and Sattler's. Respondents do not contest AAL's contention that other contracts are substantially similar on this point.

[3] The bylaw provision entitled, "Resolution of Disputes" provides:

> (a) Purpose. The purpose of this section is to prescribe the sole means to present and resolve grievances, complaints or disputes brought by members, certificate owners, or beneficiaries against the Association or its directors, officers, agents and employees. Procedures set forth in this section are meant to provide prompt fair and efficient opportunities for dispute resolution consistent with the fraternal nature of the Association, without the delay and expense of formal legal proceedings.
>
> (b) Scope. This section applies to all past, current and future benefit certificates, members, insureds, certificate owners and beneficiaries, It applies to all claims, actions, disputes and grievances of any kind or nature whatsoever. It includes, but is not limited to claims based on breach of benefit contract, as well as claims based on fraud, misrepresentation, violation of statute, discrimination, denial of civil rights, conspiracy, defamation, and infliction of distress

(Continued on following page)

against the Association or its directors, officers, agents or employees. This section does not apply to actions brought by the Association including, but not limited to actions for declaratory judgment, determining proper payees, recovering amounts due, and contesting insurance coverage or membership eligibility.

(c) Procedures. No lawsuits or any other actions may be brought for any claims or disputes covered by this section. The following are the steps and procedures for presenting and resolving disputes:

Step 1. Appeal. Appeal of the dispute to a designated reviewer within the Association as appropriate to the dispute.

Step 2. Mediation. If Step 1 does not result in a mutually satisfactory resolution, either party has the right to have the matter mediated in accordance with the applicable mediation rules of the American Arbitration Association (or other neutral organization as agreed upon by the parties).

Step 3. Arbitration. If there is still no mutually satisfactory resolution, the matter will be resolved by binding arbitration in accord with the rules of the American Arbitration Association. The arbitrator(s) may award any actual damages incurred for which there is liability, but may not award attorneys' fees, or compensatory, exemplary, extracontractual or punitive damages. The decision of the arbitrator(s) is binding and final. Additional procedural rules may be defined in policies established by the Association and made available upon request. If a claim or dispute is subject to law that prohibits parties from agreeing to submit future disputes to binding arbitration, arbitration results shall be nonbinding, unless both the individual and the Association voluntarily agree to binding arbitration after the claim or dispute has arisen.

(d) Costs. Fees and expenses of the mediator and/or arbitrator shall be paid out of a dispute resolution fund established by the Association. This does not include attorneys' fees, experts' fees, or discovery costs which each party shall bear as its own responsibility.

(e) Joinder of Disputes. No claim or dispute may be brought against the Association or its directors, officers,

(Continued on following page)

not prescribe the means for resolving disputes, but provided a default three year limitation period.[4]

AAL filed its amended bylaws with the Wisconsin Commissioner of Insurance on April 2, 1999. (Westmark Declaration ¶ 4, Exhibit C) AAL filed the amended bylaws with the State of Illinois Director of Insurance, the State of Minnesota's Commissioner of Commerce, the State of Missouri's Director of Insurance, and the State of North Dakota's Commissioner of Insurance. (Westmark Declaration ¶¶ 5-8, Exhibit C) AAL's bylaws provide that "[a]ll amendments to the Articles of Incorporation and Bylaws of the Association shall be published in *Correspondent* not later than four months after the date of filing such amendments with the Commissioner of Insurance of the state of Wisconsin." (Amended Petition ¶ 14; Sattler Response to Petition to Compel, Elia Affidavit in Support, Ex. B at § 26; Answer ¶ 41) *Correspondent* is the official

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> agents or employees, in a representative capacity, or on behalf of any "class" of persons or members (xxxillegible) of multiple persons may be joined and presented under this section provided all affected members, certificate owners and beneficiaries consent in writing, or if the Assocaision [sic] determines that joinder is appropriate.

(Id. at § 12). Respondents concede that the bylaws were again amended on October 19, 2000, to include compensatory damages as available relief under the arbitration clause. *See* Radmer Reply Brief, Exhibit B.

[4] Section 11 of the 1978 and 1986 versions of the bylaws provides: "No court action may be started on any claim arising out of a certificate of insurance, unless the action is started within the time allowed by the laws of the jurisdiction in which the cause of action accrues. In the absence of any such laws, the court action must be started within three years from the dated [sic] the claim arises." (Respondents memorandum in Opposition, Ex. A; Sattler Response to Petition to Compel, Elia Affidavit in Support, Ex. C)

publication of AAL. (*Id.*) AAL published a description of the bylaw amendment in the May/June 1999 issue of *Correspondent*, and a more detailed summary the arbitration procedure in an insert in the July/August issue, but did not include a complete copy of the bylaw amendment. (Petiton [sic] ¶ 16; Sattler Response to Petition to Compel, Elia Affidavit in Support, Ex. F,G)

On August 5, 1999, the Radmer respondents filed a class action against AAL in Jackson County Circuit Court in Kansas City, Missouri, on behalf of themselves and others similarly situated, asserting claims of fraud, breach of contract, negligence, breach of fiduciary duty, and unjust enrichment. (Amended Petition ¶ 15; Answer ¶ 15) That action was removed to the United States District Court for the Western District of Missouri, but subsequently remanded. (Answer ¶ 2) Charles Sattler filed a similar action in Cook County Circuit Court on November 2, 1999, asserting claims of fraud, fraudulent inducement, negligent misrepresentation, breach of fiduciary duty and constructive fraud, negligence, unjust enrichment and imposition of a constructive trust, and breach of contract.

AAL submits that it advised the Radmer respondents in its notice of removal, filed September 30, 1999, in *Radmer v. Aid Ass'n for Lutherans*, Civil No. 99-0961-CV-W-9 (W.D.MO) that it "contends that all of the plaintiffs' claims are arbitrable" and "that – unless plaintiffs consent to arbitrate this dispute – it will promptly seek judicial relief to compel arbitration." (Amended Petition ¶ 16) AAL submits that essentially the same statement was made in the notice of removal filed on December 1, 1999, in the Sattler Action. (Id. at ¶ 17)

Subsequently, AAL filed a petition to compel respondents to arbitrate their disputes, pursuant to the Federal Arbitration Act, 9 U.S.C. §1 *et seq* (FAA).

II. ARGUMENTS

AAL filed this petition to compel arbitration, contending that the life insurance contracts provide that arbitration is the sole means of resolving members' disputes arising under the policy. Because the insurance contracts incorporate the society's bylaws and any amendments, AAL contends that the amendment to its bylaws that require members to arbitrate disputes with AAL applies to those disputes. According to AAL, an order compelling arbitration is required under the FAA. AAL urges the court to focus on the nature of the contracts at issue: open contracts between a fraternal benefit society and its members which provide expressly that bylaw amendments are terms of the contracts. When respondents entered the contracts, they became parties to open contracts subject to binding bylaw amendments in exchange for the life insurance benefits under the contract. The Radmer respondents and Sattler filed separate briefs in opposition to the motion to compel.

Respondents urge the court to dismiss AAL's petition arguing that the arbitration provision is invalid and unenforceable. They contend that they did not agree to arbitrate disputes with AAL and that the FAA does not apply. Respondents contend that there is no valid obligation to tender their claims against AAL for arbitration because there was no mutual assent to alter the essential term of the right to seek redress in courts. Moreover, respondents submit that their right of access to courts for

resolution of disputes with AAL was express and unqualified, and vested at the time of contracting. They further argue that there is no mutuality of obligation and no consideration for relinquishing the right to bring disputes to court. Moreover, the unilateral amendment of the life insurance contract results in an unreasonable contract of adhesion that breaches the duty of good faith and fair dealing. Respondents contend that even if the arbitration provision is otherwise valid, it is unenforceable because it is procedurally and substantively unconscionable.

Additionally respondents contend that this court lacks jurisdiction because AAL does not have Article III standing to compel arbitration under the FAA, as the right to arbitrate is not ripe. And, that pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), the Missouri Uniform Arbitration Act preempts the FAA and prohibits arbitration. Lastly, respondents demand a jury trial to determine the factual issue of whether there was an agreement to arbitrate.

A. VALIDITY AND ENFORCEABILITY OF ARBITRATION CLAUSE

The FAA provides a federal remedy for a party 'aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration,' and directs the federal court to order arbitration once it is satisfied that an agreement for arbitration has been made and has not been honored. 9 U.S.C. § 4. Therefore, the threshold inquiry is whether a valid and enforceable agreement to arbitrate has been made.

State contract defenses may be applied to invalidate arbitration clauses if those defenses apply to contracts

generally. *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687, 116 S.Ct. 1652, 1656 (1996); *We Care Hair Development, Inc. v. Engen, et al*, 180 F.3d 838, 842 (7th Cir. 1999). A federal court looks to the state law that ordinarily governs the formation of contracts to determine whether a valid agreement to arbitrate arose. *Gibson v. Neighborhood Health Clinics, Inc.*, 121 F.3d 1126, 1130 (7th Cir. 1997)

While the parties have cited choice of law principles of various states, no party has identified the law a Wisconsin federal court sitting in diversity applies to the issues raised. *See Massachusetts Bay Ins. Co. v. Vic Koenig Leasing, Inc.*, 136 F.3d 1116, 1122 (7th Cir. 1998) ("A federal court sitting in diversity looks to the conflict-of-laws rules in the state jurisdiction in which it sits in order to choose the substantive law applicable to the case."). Nor has there been an adequate identification of the relevant contacts to each state or the significance of those contacts, in accordance with Wisconsin choice of law principles. *See Sybron Transition Corp. v. Security Ins. Co. of Hartford*, 107 F.3d 1250, 1255 (7th Cir. 1997).

However, both parties submit that the laws of each respondent's domicile, Missouri, Illinois, North Dakota, and Minnesota – the states where the insurance policies were delivered – govern as to the validity of the contracts. "[I]t is the exceptional circumstance that a federal court . . . will not honor a choice of law stipulation." *Id.* at 1120. Notably, the parties have not identified principals of contract validity or enforcement that are peculiar to any one of respondents' states, and this court has not found conflicts in the relevant principles in the laws of the respective states. *See Hill v. Gateway*, 105 F.3d 1147, 1149 (7th Cir. 1997) ("[N]either side has pointed us to any

atypical doctrines in those states that might be pertinent; [Seventh Circuit law] therefore applies to this dispute."). *See also International Administrators, Inc. v. Life Ins. Co. of North America*, 753 F.2d 1373, 1376 (7th Cir. 1985).

Yet, the life insurance policies at issue are not "mere contract[s] to be construed and enforced according to the laws of the state where [they were] delivered." *See Sovereign Camp. W.O.W. v. Bolin*, 305 U.S. 66, 75 59 S.Ct. 35, 38 (1938) ("Entry into membership of an incorporated beneficiary society is more than a contract; it is entering into a complex and abiding relation and the rights of membership are governed by the law of the state of incorporation."); *Markovitz v. Brith Abraham Fraternal Order*, 361 S.W.2d 302, 305-306 (Mo. App. 1962). The parties have not raised the issue of how Illinois, Minnesota, Missouri or North Dakota, treat insurance contracts of foreign benefit societies, except to note that bylaw amendments must be filed with the insurance regulators of those states. *See* 215 Ill.Comp.Stat. 5/292.1; Minn. Stat. § 64B.11; Mo. Stat. § 378.611; N.D. Cent. Code § 26.1-15.1-1. However, as noted earlier, the respondents purchased life insurance contracts from AAL and thereby are insured AAL members. And, AAL is incorporated and headquartered in Wisconsin. The authority granted to AAL's Board of Directors, as representatives of all AAL members, is a matter of corporate governance which is central to the relationship of the insurer with its insured. However, this authority is derived from and subservient to the law of the state of incorporation. *See Bolin*, 305 U.S. 66. Hence, the contract rights of AAL members and the powers of AAL's Board of Directors rest on Wisconsin law and the body of the insurance policies at issue. Even so, bylaw amendments must not conflict with the laws of each respondents'

state. *See Wheeler v. Mutual Reserve Fund Life Association*, 1902 WL 1882 *6 (Ill. App. 1902).

Under Wisconsin law, the policy or certificate, the articles of incorporation and the society's bylaws comprise the agreement between the fraternal benefit society and the owner of a life insurance policy it issues, and the certificate issued is required to state that is so. W.S.A. § 632.93(1); W.S.A. § 614.01. *See also* 215 Ill. Comp. Stat. 5/300.1(a); Minn. Stat. § 64B.19(1); Mo. Ann. St. § 378.619(1); N.D. Cent Code § 26.1-15.1-19(1). Changes in the articles or bylaws that are made subsequent to the issuance of a policy bind the owner, "so long as they do not destroy or diminish benefits promised in the policy." W.S.A. § 632.93(2). *See also* 215 Ill. Comp. Stat. 5/300.1(b) ("[N]o change, addition or amendment shall destroy or diminish benefits which the society contracted to give the owner . . ."); Minn. Stat. § 64B.19(2) (same); Mo. Ann. St. § 378.619(2) (same); N.D. Cent Code § 26.1-15.1-19(2) (same).

Historically, Wisconsin courts have refused to enforce bylaw amendments in fraternal benefit society insurance policies that impair the benefits promised, but have enforced subsequently enacted bylaws that do not affect material changes to the policies. *See United Order of Foresters v. Miller*, 190 N.W. 197, 202 (Wis. 1922) (reviewing early decisions). Respondents quote a Wisconsin Supreme Court case that seems to suggest a broader rule:

> "The reserve power made a part of the contract of insurance that plaintiff should comply with all the laws, rules, and regulations of the defendant warranted only reasonable changes in the manner and mode as to details of carrying out the scheme of insurance. It did not authorize defendant to

> nullify any essential feature of the contract entered into. . . . Such provision relates to the conduct and government of the society in relation to its members, and does not affect the substantial portions of its insurance contracts with them. True it may authorize the society to change the details of the mode or manner in which it shall carry on the insurance part of its business, as well as its other business, with members; but it cannot be made the cloak for compelling a member to accept a substantially different contract of insurance from the one entered into when the certificate was issued."

Stirn v. Supreme Lodge of Bohemian Slavonian Benev. Society, 136 N.W. 164, 166 (Wis. 1912). However, the holding of that case concerned a "material change" in benefits; the court refused to enforce a bylaw amendment where the husband and wife were both beneficiaries and both insureds on original certificate, but where after the amendment, only the husband was insured and the wife was merely a beneficiary. *Id.*

Respondents' respective states of residence have similar policies toward enforcement of subsequently enacted bylaws: amendments must be reasonable and may not affect vested rights. In a relatively recent case, the North Dakota Supreme Court held that a beneficial association could not reduce benefits to a member who had already qualified for and was receiving benefits under the old bylaws. *Bloom v. Northern Pacific Beneficial Association*, 193 N.W.2d 244, 251 (N.D. 1971) ("In reviewing the applicability of bylaw amendments, courts generally will look, first, to the reasonableness of the amendment and second, to whether the amendment affects vested rights."). *See also Jenkins v. Talbot*, 338 Ill. 441, 458 170 N.E. 735,

751 (Ill. 1930) ("The right of a fraternal beneficiary society to amend its by-laws . . . extends to by-laws increasing rates, changing the plan of assessment for the general good, and changing other terms of the contract, provided such amendments are not arbitrary and unreasonable."); *Dessauer v. Supreme Tent, Knights of the Maccabees of the World*, 210 S.W. 896, 896-97 (Mo. 1919) ("[T]he decisions of the courts of this state . . . are unanimous in holding that the contract rights between the parties regarding the benefits the member is to receive under the terms of the policy cannot be destroyed, impaired or taken away from him by a subsequently enacted bylaw by the association . . ."); *Rosenstein v. Court of Honor*, 122 Minn. 310, 315, 142 N.W. 221, 333 (Minn. 1913) ("[A] member is not bound by a by-law subsequently adopted unless such by-law be reasonable as applied to such member."). In *Rosenstein*, the Minnesota Supreme Court refused to give effect to a bylaw that created a one-year limitation for bringing suit, where there was no limitation period in the insurance certificate at the time of issuance, other than a six-year period provided by the general statutes. 122 Minn. at 315. Because plaintiff, a beneficiary of the policy, did not have notice of the adoption of the bylaw, the limitation period was shortened by five years, and the period had expired before she learned of the amendment, the court concluded that the amendment was unreasonable as it applied to her. *Id.* at 315-316.

The decisions of Alabama state and federal courts enforcing arbitration clauses in subsequently enacted bylaws in the *Woodmen of the World* line of cases are especially persuasive. *See Woodmen of the World Life Insurance Society v. Harris*, 740 So.2d 362 (Ala. 1999); *Woodmen of the World Life Insurance Society v. White*, 35

F.Supp.2d 1349 (M.D.Ala. 1999); *Woodmen of the World Life Insurance Society v. Johnson*, 23 F.Supp.2d 1344 (S.D. Ala. 1998), *Clayton v. Woodmen of the World Life Insurance Society*, 981 F.Supp. 1447 (M.D.Ala. 1997). Having considered these decisions, the court concludes that the arbitration provision added to AAL's insurance contracts is valid and enforceable; that it was created in accordance with principles of contract formation; and that it is not unconscionable.

Respondents' contentions that there are no valid agreements to arbitrate for lack of consideration, mutuality of obligation, or mutual assent to arbitrate are misplaced. While respondents correctly state that consideration is a fundamental element of contract formation, citing Farnsworth, Contracts, 2 ed. §§ 2.2-2.3, they have not demonstrated that consideration was lacking when these contracts were formed. They have not cited any authority to support the proposition that independent consideration is required every time a fraternal organization amends its bylaws, thereby amends its insurance policies while not diminishing benefits.[5] Likewise, respondents do

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[5] Moreover, AAL will incur mediation or arbitration fees and expenses and will be bound by the results of arbitration, forgoing the right to appeal. *See Doyle*, 708 N.E.2d at 1145 ("Consideration consists of some detriment to the offeror, some benefit to the offeree, or some bargained-for exchange between them. Any act or promise which is of benefit to one party or disadvantage to the other is a sufficient consideration to support a contract.") (citations omitted); *Misemer v. Freda's Restaraunt* [sic], *Inc.*, 961 S.W.2d 120, 122 (Mo. Ct. App. 1998) ("Consideration sufficient to support a contract may be either a detriment incurred by promisee or a benefit to the promisor."); *Cardinal Consulting v. Circo Resorts, Inc.*, 297 N.W. 2d 260, 266 (Minn. 1980) (same); *Aho v. Maragos*, 605 N.W.2d 161, 163-64 (N.D. 2000) (same).

not identify any authority for the proposition that Missouri, Minnesota, North Dakota and Illinois require mutuality of obligation. Indeed, Illinois follows the majority of states adopting the Second Restatement approach, where mutuality of obligation is not mandatory if the requirement of consideration is satisfied. Restatement (Second) of Contracts s 79 (1979); *Design Benefit Plans v. Enright,* 940 F.Supp 200, 205 (N.D. IL 1996); *Seymour v. Gloria Jean's Coffee Bean Franchising Corp.*, 732 F.Supp. 988, 996 (D.Minn.1990).

Respondents' add that the bylaw amendment was not contemplated at formation, rendering the contract invalid for lack of mutual assent. They contend that the right to seek redress in court was an essential term, expressly reserved in the contract, that vested upon execution of the contract. The court is not persuaded.

Each respondent agreed to be bound by subsequent changes in the articles of incorporation or the bylaws, so long as any change does not reduce, destroy or diminish benefits AAL promises to pay. The right to seek redress in court is not a "benefit" of the contract that AAL provides to its members, *see* 215 Ill. Comp. Stat, 5/297.1(a) (defining benefits a society is authorized to provide to its members); Minn. Stat. § 64B.16(1); MO. Stat. § 378.616(1); N.D. Cent. Code § 26.1-15.1-16.1, therefore the amendment is not outside the scope of that agreement. Nor was the right to a judicial remedy "expressly reserved." Rather, the pre-amendment bylaws provided a default limitations period to bring an action in court – in effect, restricting legal remedies, not creating a right to file suit. Regarding vested rights, respondents again fail to cite authority, let alone controlling authority, for the bald assertion that the right to sue vested when the parties entered into their

insurance contracts. *See Shultz v. Supreme Tent, Knights of Maccabees of the World*, 236 S.W. 903 (Mo.App. 1922)

Respondents urge the court decline enforcement of the arbitration provision on the ground that it is unconscionable. They contend the arbitration provision is procedurally unconscionable because it was imposed unilaterally and retroactively, while respondents had no bargaining power or meaningful choice, and that the respondents were not properly notified of the amendment. They argue that it is oppressively one-sided, restricts legal remedies, prohibits class actions, and deprives respondents of their right to a jury trial, rendering it substantively unconscionable.

To determine whether a contract provision is unconscionable, Illinois courts look to the circumstances existing at the time of the contract's formation, including the relative bargaining positions of the parties and whether the provision's operation would result in unfair surprise. *We Care Hair Development Inc. v. Engen*, 180 F.3d 838, 842-43 (7th Cir. 1999). A contract is unconscionable when, viewed as a whole, "it is improvident, oppressive, or totally one-sided." *Id.* An unreasonable term that "no one in his right mind would have agreed to" can be relevant to drawing an inference of unconscionability. *Id. See also Ricks v. Missouri Local Government Employees' Retirement System*, 981 S.W.2d 585, 594 (Mo. App. 1998). North Dakota courts have taken a similar approach testing for procedural unconscionability which relates to unfair surprise, oppression, and inequality of bargaining power, and substantive unconscionability which focuses on the harshness or one-sidedness of a contractual provision. *Construction Assoc., Inc. v. Fargo Water Equip. Co.*, 446 N.W.2d 237, 243 (N.D. 1989) (consumer transactions under

the UCC); *Osgood v. Medical, Inc.*, 415 N.W.2d 896, 901 (Minn.App. 1987). Wisconsin courts take the same approach, requiring both procedural and substantive unconscionability. *See Leasefirst v. Hartford Rexall Drugs, Inc.*, 483 N.W.2d 585, 587-88 (Wis. App. 1992).

The court is not persuaded that the insurance contracts are unconscionable. It can hardly be said that the retroactive application of a bylaw amendment is procedurally unconscionable where members of the fraternal society voluntarily entered contracts that expressly state that contract incorporates the bylaws and "[a]ny changes." Indeed, inclusion of that term, and such treatment of a bylaw amendment is required by statute. See W.S.A. § 632.93; 215 Ill. Comp. Stat. 5/300.1; Minn. Stat. § 64B.19; Mo. Ann. St. § 378.619; N.D. Cent Code § 26.1-15.1-19. Moreover, to characterize the bylaw amendment as unilateral, without any bargaining power or meaningful choice on respondents part, disregards AAL's representative form of government. *See* W.S.A. § 614.01. While arguably the notice of the bylaw amendment in the *Correspondent* was not in technical compliance with AAL's requirements for publication of bylaw amendments, it did comply with the statutory requirements for notice. *See* Wis. Stat. § 614.12(4) ("[A]copy of the bylaws and any amendments to them shall be filed with the commissioner promptly after adoption, and notice of amendments to the bylaws shall be given promptly to members"); 215 Ill.Comp.Stat. 5/292.1; Inn. Stat. § 64B.11; Mo. Stat. § 378.611; N.D. Cent. Code § 26.1-15.1-11. Furthermore, the published notice substantially complies with the bylaw requirements. *See Franklin County Bldg. Assn v. Cravens*, 2 N.E.2d 122 (Ill. App. 1936); *Central Kansas Credit Union*

v. Mutual Guar. Corp., 886 F.Supp. 1529, (D.Kan. 1995).; Fletcher Cyc Corp § 4179 (2001).

That the amendment pertains to an agreement to arbitrate fails to render it unenforceable. *See R.J. O'Brien & Assoc., Inc. v. Pipkin*, 64 F.3d 257, 260-61 (7th Cir. 1995); *Geldermann, Inc. v. Commodity Futures Trading Commission*, 836 F.2d 310, 317 (7th Cir. 1987). The limitation on relief such as attorney's fees, exemplary, extra-contractual or punitive damages is not oppressive. *See Baravati v. Josephthal, Lyon & Ross, Inc.* 28 F.3d 704, 709 (7th Cir. 1994) ("Short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes . . . and surely can stipulate that punitive damages will not be awarded."); *Compare Coddington Enterprises v. Dean Werries*, 54 F. Supp.2d 935, 941 (W.D. Mo. 1999); *Simitar Entertainment Inc. v. Silva*, 44 F.Supp.2d 986 (D. Minn 1999). Despite respondents' speculative extension of the holding in *Coddington Enterprises*, they have not identified any authority refusing to enforce an arbitration provision limiting remedies that are not guaranteed by statute. Likewise, the preclusion of class actions cannot be unconscionable, as courts may not order class arbitration if the arbitration provision is silent on class treatment. *See Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 275 (7th Cir. 1995). And, the requirement that disputes be submitted to arbitration does not violate the right to a jury trial, because that right is waivable. *See Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 368 (7th Cir. 1999).

Respondents request that the court to find that the parties did not make an agreement to arbitrate ignores the fact that the insurance policies in question are different

from ordinary contracts. *See Sovereign Camp. W.O.W. v. Bolin*, 305 U.S. 66, 75 59 S.Ct. 35, 38 (1938). The statutes governing insurance contracts issued by fraternal benefit societies address the fairness concerns underlying the doctorine [sic] of unconscionability, i.e., they require that the policy of insurance or certificate state that current and future bylaws are incorporated into insurance; that notice of bylaw amendments be sent to members; and that bylaw changes not destroy benefits promised under the contract. Each requirement is met in this case. Moreover, the amendments are reasonable and do not impair vested rights. As petitioners note, the arbitration provision is particularly appropriate in light of the maintenance of solvency provision required by law. See W.S.A. 614.19(3); 215 Ill. Comp. Stat. 5/300.1(d); Minn. Stat. §64B.19(4); Mo. Ann. Stat. §378.619.4; N.D. Cent. Code § 26.1-15.1-19(4).

As there is no factual issue concerning whether respondents entered the fraternal benefit contracts, the FAA does not require a jury trial. The arbitration provision binds respondents as a matter of law. *See Saturday Evening Post v. Rumbleseat*, 816 F.2d 1191, 1196 (7th Cir. 1987); *Matterhorn, Inc. v. NCR Corporation*, 763 F.2d 866, 873 (7th Cir. 1985); *Brook Mays Music Co. v. National Cash Register Co.*, 838 F.2d 1396, 1399 (5th Cir. 1988)

B. STANDING

The AAL bylaw at issue requires that members first appeal any dispute for internal review, then mediate any unsatisfactory resolution. Binding arbitration is the third step if the outcome of the first two is not mutually satisfactory. Respondents raise a novel argument that AAL does not have Article III standing to request that this

court compel arbitration, and therefore the court does not have the power to compel arbitration pursuant to the FAA. It reasons that the parties have not yet reached the stage in AAL's dispute resolution process where arbitration is purportedly required. The Radmer respondents contend that the proper course for AAL to contest the respondents' failure to comply with those provisions is as a compulsory counterclaim to the complaint in the Missouri action for breach of contract.

The court is not persuaded that respondents can create a ripeness issue by refusing to take the necessary steps to be entitled to arbitrate their dispute and filing a lawsuit instead. *See Southwestern Elec. Power Co. v. Local Union No. 738, Intern. Broth. of Elec. Workers, AFL-CIO*, 293 F.2d 929, 932 (5th Cir. 1961) (holding the party repudiating arbitration as a means to settle dispute is estopped to assert that specified conditions precedent to arbitration have not bee [sic] performed). Moreover, it would be incongruous with of the FAA for this court to decline to enter "an order directing parties to proceed to arbitration *in accordance with the terms of the agreement,*" because the opposing party refused to comply with the agreement in the first place. *See* 9 U.S.C. § 4 (emphasis added). Therefore, the court concludes that the controversy of whether to compel arbitration is "ripe" for resolution, therefore AAL has Article III standing to challenge resondents' [sic] refusal to arbitrate.

C. PREEMPTION

Respondents contend that in Martin Radmer's case, the FAA does not apply, because Missouri law excluding

arbitration provisions in insurance contracts from enforceable arbitration provisions, Mo. Stat. 435.350, controls pursuant to the McCarran-Ferguson Act, 15 U.S.C. § 1012(b) (1994). The McCarran-Ferguson Act provides:

> No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

15 U.S.C. § 1012(b). However, the Missouri laws governing fraternal benefit societies make clear that benefit societies such as AAL are exempt from Missouri insurance laws, except where such laws expressly state that they apply to fraternal benefit societies. *See e.g.* Mo. Stat § 378.623. Therefore, the FAA is applicable to fraternal benefit societies, notwithstanding the Missouri exception to the enforceability of arbitration clauses pertaining to insurance contracts, because that rule does not expressly state that it applies to fraternal benefit societies. See. Mo. Stat § 435.350.

The court is satisfied that the parties validly entered into an agreement to arbitrate the disputes underlying this action. Now, therefore,

IT IS ORDERED that AAL's petition to compel arbitration is granted.

IT IS FURTHER ORDERED that the parties are directed to proceed to arbitration in accordance with the terms of their agreement, and to proceed no further on these issues in any other trial court pending completion of arbitration.

Dated at Milwaukee, Wisconsin, this 31st day of October, 2001.

BY THE COURT

/s/ C. N. Clevert
C. N. CLEVERT
U. S. District Judge

This 1st day of November, 2001, pursuant to Rule 77(d) Federal Rules of Civil Procedure, copies of this document were mailed by [Illegible] to the following parties:

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

GLENN A. HAWKINS,
NEDRA J. HAWKINS,
on behalf of themselves and
others similarly situated,

Plaintiff,

v. Case No. 00-C-1327

AID ASSOCIATION FOR LUTHERANS,

Defendant.

GRANTING MOTION TO COMPEL ARBITRATION; GRANTING MOTION FOR LEAVE TO FILE A RESPONSE TO SUPPLEMENTAL AUTHORITY; AND DISMISSING CASE WITHOUT PREJUDICE

(Filed Oct. 31, 2001)

The following motions are pending before this court: defendant's motion to compel arbitration and stay this litigation and defendant's motions for leave to file supplemental authority. On September 28, 2001, the court held a telephonic hearing to consider arguments on the choice of law applicable to the motion to compel arbitration. Attorneys John A. Yanchunis, Michael J. Peacock, and Robert R. Sparks made appearances on behalf of the plaintiffs; and Attorneys James P. Gillespie and Thomas L. Shriner appeared for the defendants. The court will grant the motions and dismiss the case without prejudice for administrative purposes.

BACKGROUND

Aid Association for Lutherans (AAL) is a fraternal benefit society incorporated in Wisconsin, and headquartered in Appleton, Wisconsin. (Compl. ¶ 15; Memorandum in Support of AAL's Motion to Compel Arbitration (hereinafter "AAL's Memorandum in Support") at 2) A fraternal benefit society under Wisconsin law is a non-stock corporation that exists solely for the benefit of its members and beneficiaries and other specified purposes, has a representative form of government, and provides insurance. Wis. Stat. § 614.01. Plaintiffs Glen Hawkins and Nedra Hawkins are Indiana residents and insured AAL members with life insurance contracts[1]. (Compl. ¶¶ 12-14) (Plaintiff's Response to Defendants Motion to Compel[2] (hereinafter "Plaintiff's response") at 1; AAL's Memorandum in Support at 2) Section 1.2 of Nedra Hawkins' life insurance policy provides:

> The entire contract between you and AAL is made up of: [t]his certificate including any attached riders, endorsements or amendments; [t]he attached application, including any application for increase in the specified amount; and [t]he AAL Articles of Incorporation and Bylaws.

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[1] Throughout this decision and throughout the parties' submissions, the life insurance policies are referred to as contracts, policies, or certificates, interchangeably.

[2] Plaintiffs caption their response as Plaintiffs' Response to Defendants' Motion to Compel Arbitration and Stay This Litigation Pending Arbitration and Answer and Affirmative Defenses for Counterclaim for Declaratory Relief. Though that designation does not necessarily give the parties submissions the operative effect of pleadings, for purposes of the motion to compel, the court will treat the parties' undisputed factual statements as affirmative allegations.

> Any changes to the Articles of incorporation and Bylaws made after this certificate is issued will not reduce the benefits AAL promises to pay.

(AAL's Memorandum in Support, Exhibit A, Nedra Hawkins August 20, 1996, Certificate Number 07474789; Plaintiff's Response at 7)[3] AAL's Bylaws state that "Any subsequent changes to the articles of incorporation or bylaws shall be binding upon the member, beneficiaries or other persons affected, and shall govern and control in all respects." (AAL's Memorandum in Support, Exhibit B, Bylaws § 4; Plaintiff's Response, Exhibit B, Bylaws § 4)

On March 27, 1999, AAL's Board of Directors, by unanimous written action, amended AAL's bylaws to provide for mandatory binding arbitration for member disputes with AAL. (AAL's Memorandum in Support at 3, Exhibit B, Bylaws § 12; Plaintiff's Response, Exhibit D, Bylaws § 12; Westmark Declaration ¶ 3, Exhibit B)[4] Prior

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[3] Plaintiffs have a several policies that contain the same language. (AAL's Memorandum in Support, Exhibit A)

[4] The bylaw provision entitled, "Resolution of Disputes" provides:

(a) Purpose. The purpose of this section is to prescribe the sole means to present and resolve grievances, complaints or disputes brought by members, certificate owners, or beneficiaries against the Association or its directors, officers, agents and employees. Procedures set forth in this section are meant to provide prompt fair and efficient opportunities for dispute resolution consistent with the fraternal nature of the Association, without the delay and expense of formal legal proceedings.

(b) Scope. This section applies to all past, current and future benefit certificates, members, insureds, certificate owners and beneficiaries, It applies to all claims, actions, disputes and grievances of any kind or nature whatsoever. It includes, but is not limited to claims based on breach of benefit contract, as well as claims based on fraud, misrepresentation, violation of statute, discrimination, denial of civil rights, conspiracy, defamation, and infliction of distress against the Association or its

(Continued on following page)

directors, officers, agents or employees. This section does not apply to actions brought by the Association including, but not limited to actions for declaratory judgment, determining proper payees, recovering amounts due, and contesting insurance coverage or membership eligibility.

(c) Procedures. No lawsuits or any other actions may be brought for any claims or disputes covered by this section. The following are the steps and procedures for presenting and resolving disputes:

Step 1. Appeal. Appeal of the dispute to a designated reviewer within the Association as appropriate to the dispute.

Step 2. Mediation. If step 1 does not result in a mutually satisfactory resolution, either party has the right to have the matter mediated in accordance with the applicable mediation rules of the American Arbitration Association (or other neutral organization as agreed upon by the parties).

Step 3. Arbitration. If there is still no mutually satisfactory resolution, the matter will be resolved by binding arbitration in accord with the rules of the American Arbitration Association. The arbitrator(s) may award any actual damages incurred for which there is liability, but may not award attorneys' fees, or compensatory, exemplary, extra-contractual or punitive damages. The decision of the arbitrator(s) is binding and final. Additional procedural rules may be defined in policies established by the Association and made available upon request. If a claim or dispute is subject to law that prohibits parties from agreeing to submit future disputes to binding arbitration, arbitration results shall be nonbinding, unless both the individual and the Association voluntarily agree to binding arbitration after the claim or dispute has arisen.

(d) Costs. Fees and expenses of the mediator and/or arbitrator shall be paid out of a dispute resolution fund established by the Association. This does not include attorneys' fees, experts' fees, or discovery costs which each party shall bear as its own responsibility.

(e) Joinder of Disputes. No claim or dispute may be brought against the Association or its directors, officers, agents or employees, in a representative capacity, or on behalf of any "class" of persons or members (xxxillegible) of multiple persons may be joined and presented under this section provided all affected members, certificate owners and beneficiaries consent in writing, or if the Association determines that joinder is appropriate.

(Continued on following page)

to the amendment, AAL's bylaws did not prescribe the means for resolving disputes, but did provide a default three year limitation period.[5]

AAL filed its amended bylaws with the Wisconsin Commissioner of Insurance on April 2, 1999, (Westmark Declaration ¶ 4, Exhibit C; Plaintiff's Response, Exhibit C) and with the Indiana Commissioner of Insurance on or about the same date. (Westmark Declaration ¶¶ 5, Exhibit D) The bylaws provide that "[a]ll amendments to the Articles of Incorporation and Bylaws of the Association shall be published in *Correspondent* not later than four months after the date of filing such amendments with the Commissioner of Insurance of the state of Wisconsin." (AAL's Memorandum in Support, Exhibit B, Bylaws § 26; Plaintiff's Response, Exhibit D, Bylaws § 26) AAL published a description of the bylaw amendment in the May/June 1999 issue of *Correspondent,* its official publication, and a more detailed summary of arbitration procedure in an insert to the July/August issue, but did not publish the entire bylaw amendment at that time. (Westmark Decl. ¶¶ 6-7, Exhibits E-F)

(Id. at § 12). AAL amended the bylaws again on October 19, 2000, to delete compensatory damages from the exclusion to relief available under the arbitration clause. (Westmark Decl. ¶¶ 8-11, Exhibits G-J)

[5] Section 11 of the 1978 version of the bylaws provides: "No court action may be started on any claim arising out of a certificate of insurance, unless the action is started within the time allowed by the laws of the jurisdiction in which the cause of action accrues. In the absence of any such laws, the court action must be started within three years from the dated [sic] the claim arises." (Plaintiff's Response, Ex. B, Bylaws § 11)

On July 18, 2000, plaintiffs filed a class action complaint in Indiana's Wabash County Circuit Court, seeking declaratory relief, injunctive relief and damages resulting from AAL's alleged scheme of deceptive and misleading sales practices in marketing life insurance policies. The complaint asserts that AAL's "single pay," "churning," "investment/savings plan," "level premium" sales practices, and a mandatory arbitration plan of March 1999, comprise a scheme of deceptive, misleading and fraudulent practices. Further, the complaint charges that AAL's conduct constitutes breach of contract, breach of the duty of good-faith and fair dealing; breach of fiduciary duty; negligent misrepresentation; fraudulent inducement, and negligent supervision. In addition, plaintiffs seek declaratory judgment that the arbitration provision is invalid.

AAL removed the action to the U.S. District Court for the Northern District of Indiana on July 28, 2000. In the notice of removal, AAL advised that it would seek judicial relief to compel arbitration if plaintiffs did not consent to do so. U.S. District Judge Allen Sharp transferred the action to this court pursuant to 28 U.S.C. § 1404(a), so the case could be decided with related cases then pending in this district.

Subsequently, AAL filed a petition to compel plaintiffs to arbitrate their disputes, pursuant to the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.*

ARGUMENTS

AAL seeks to compel arbitration of plaintiffs' claims, pursuant to 9 U.S.C. § 3 and 4, contending that the plaintiffs' life insurance contracts, which incorporate by reference AAL's Bylaws and Amendments, provide that

arbitration is the sole means of resolving members' disputes arising under their policies. According to AAL, an order compelling arbitration is appropriate and required under the Federal Arbitration Act (FAA).

Plaintiffs construe AAL's motion as a counterclaim seeking declaratory relief, because the complaint contains a count seeking a declaratory judgment that the arbitration provision is invalid and unenforceable. They contend that passage of the arbitration provision by AAL is one component of the scheme to defraud policyholders. Therefore, rather than compelling arbitration, the court should consider all issues raised in the complaint and allow the action to proceed on all of the claims. Moreover, plaintiffs argue that the arbitration clause in the contracts is invalid and unenforceable because the parties did not mutually assent to modification of the insurance policies to include the arbitration provision; the contracts' cross references to the society's bylaws create ambiguity as to the terms of the contract; there was no consideration for the agreement to arbitrate disputes; and the arbitration provision is procedurally and substantively unconscionable.

ANALYSIS

The FAA provides a federal remedy for a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration, and directs the federal court to order arbitration once it is satisfied that an agreement for arbitration has been made but not honored. 9 U.S.C. §§ 3 and 4; *Prima Paint Corporation v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404, 87 S. Ct. 1801 (1967). Hence, the threshold inquiry is whether an enforceable agreement to

arbitrate has been made. State contract defenses may be applied to invalidate arbitration clauses if those defenses apply to contracts generally. *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687, 116 S.Ct. 1652, 1656 (1996); *We Care Hair Development, Inc. v. Engen, et al*, 180 F.3d 838, 842 (7th Cir. 1999). Ordinarily, a federal court looks to the state law that governs the formation of contracts to determine whether a valid agreement to arbitrate arose. *Gibson v. Neighborhood Health Clinics, Inc.,* 121 F.3d 1126, 1130 (7th Cir. 1997). As a transferee court presiding over a diversity case after a convenience transfer pursuant to 28 U.S.C § 1404(a), this court looks to Indiana choice of law principles to ascertain the law governing the issues raised in this dispute. *See Ferens v. John Deere Co.,* 494 U.S. 516, 524-27, 110 S.Ct. 1274 (1990).

Indiana applies a "most intimate contacts" approach to contracts, including insurance contract claims. *American Modern Home Ins. Co. v. Tranex Credit Corp.,* 2000 WL 724005, *6 (S.D.Ind. 2000); *Scheffert by Scheffert v. Jackson Nat. Life Ins. Co.* 687 N.E.2d 230 (Ind. App. 1997). Courts applying this choice of law rule "consider all acts of the parties touching the transaction in relation to the several states involved and will apply as the law governing the transaction the law of that state with which the facts are in most intimate contact." *Id.* at 232 (citations omitted). Here, the complaint, pleadings, briefs, exhibits and statements of the parties establish that Indiana is where the Hawkins reside, where AAL's agent is located, where communications occurred as to the sale and delivery of the policies at issue and where the policies were eventually sold and delivered. On the other hand, the record demonstrates that AAL is fraternal benefit society, incorporated in the State of Wisconsin, with its principal office at

Appleton, Wisconsin. And, more importantly, AAL and its Board of Directors operate under the laws of Wisconsin governing Fraternals. (Compl. ¶¶11, 15; Plaintiffs' Response, Ex s. A, D ¶¶I, II, III)

The parties are of the view that these facts support the conclusion that Indiana contract law should apply in determining whether the parties entered valid insurance contracts. However, the issue before the court is not whether the parties entered valid insurance contracts. The parties agree that AAL sold life insurance policies to the plaintiffs and that plaintiffs became members of AAL. The question that must be decided at this stage of the litigation is whether the alternative dispute resolution program, adopted by AAL's Board of Directors in March 1999, while the plaintiffs were AAL members, is valid and enforceable by this court. *See We Care Hair Development, Inc. v. Engen,* 180 F.3d 838, 844 (7th Cir. 1999). If so, AAL argues that this litigation should be stayed and that the plaintiffs should be compelled to arbitrate their dispute with AAL.

During a hearing on September 28, 2001, the parties agreed that Indiana law governs issues of contract formation and enforceability and, because AAL is incorporated in Wisconsin, that Wisconsin law governs corporate actions. *See* Tr. September 28, 2001, Doc.# 30 at 8. The court notes that "[i]t is the exceptional circumstance that a federal court, or any court for that matter, will not honor a choice of law stipulation." *Massachusetts Bay Ins. Co. v. Vic Koenig Leasing, Inc.,* 136 F.3d 1116, 1120 (7th Cir. 1998). Moreover, it is worth noting that the parties have not identified any peculiar approach to benefit contracts suggesting that the laws Wisconsin or Indiana conflict. *See Hill v. Gateway,* 105 F.3d 1147, 1149 (7th Cir. 1997) ("Neither

side has pointed us to any atypical doctrines in those states that might be pertinent; [Seventh Circuit law] therefore applies to this dispute."). *See also International Administators, Inc. v. Life Ins. Con of North America,* 753 F.2d 1373, 1376 (7th Cir. 1985).

As an initial matter, this court finds that the life insurance policies at issue are not "mere contract[s] to be construed and enforced according to the laws of the state where [they were] delivered." *See Sovereign Camp. W.O.W. v. Bolin,* 305 U.S. 66, 75 59 S.Ct. 35, 38 (1938) ("Entry into membership of an incorporated beneficiary society is more than a contract it is entering into a complex and abiding relation and the rights of membership are governed by the law of the state of incorporation."). As noted earlier, the plaintiffs purchased life insurance contracts from AAL and thereby are insured AAL members. And, AAL is incorporated and headquartered in Wisconsin. The authority granted to AAL's Board of Directors, as representatives of all AAL members, is a matter of corporate governance which is central to the relationship of the insurer with its insured. However, this authority is derived from and subservient to the law of the state of incorporation. *See id.* Hence, the contract rights of AAL members and the powers of AAL's Board of Directors rest on Wisconsin law and the body of the insurance policies at issue. This conclusion is supported by the reasoning of *Sovereign Camp. W.O.W. v. Bolin, see id.*, and the intimate contacts analysis yields the same result, as Wisconsin, the incorporation state,

has the most intimate contacts to amendments to the bylaws.[6]

Under Wisconsin law, the policy or certificate, the articles of incorporation and the society's bylaws comprise the agreement between the fraternal benefit society and

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[6] As in *Bolin*, in *Order of United Commercial Travelers of America v. Wolfe*, the United States Supreme Court highlighted some of the incorporation state's contacts and interests:

> The relationship thus established between a member and his fraternal benefit society differs from the ordinary contractual relationship between a policyholder and a separately owned corporate or 'stock' insurance company. It differs also from that between an insured member of the usual business form of a mutual insurance company and that company. The fact of membership in the Ohio fraternal benefit society is the controlling and central feature of the relationship. As long as he remains a member, the terms of his membership, including obligations and benefits relating to the insurance funds of the society, are subject to change without his individual consent. The control over those terms is vested by him and his fellow members in the elected representative government of their society as authorized and regulated by the law of Ohio. Upon that law the continued existence of the society depends. The foundation of the society is the law of Ohio. It provides the unifying control over the rights and obligations of its members. *Sovereign Camp v. Bolin*, 305 U.S. 66, 75, 59 S.Ct. 35, 37, 83 L.Ed. 45, 119 A.L.R. 478, discussed infra. It is this dependence of membership rights upon the public acts of the domiciliary state, supported by the requirement that full faith and credit shall be given in each state to those public acts, that has been recognized by this Court in the unbroken line of decisions reviewed in this opinion.

331 U.S. 586, 606-607, 67 S.Ct. 1355, 1364-1365 (1947). The parties have not raised the issue of how current Indiana law treats insurance contracts of foreign benefit societies, except to note that bylaw amendments must be filed with the Indiana insurance regulators. *See* Ind. Code § 27-11-5-1.

the owner of a life insurance policy it issues, and the certificate issued is required to state that is so. W.S.A. § 632.93(1); W.S.A. § 614.01. *See also* Ind. Code § 27-11-6-4; Ind. Code § 27-11-1-7. Changes in the articles or bylaws that are made subsequent to the issuance of a policy bind the owner, "so long as they do not destroy or diminish benefits promised in the policy." W.S.A. § 632.93(2). *See also* Ind. Code § 27-11-6-5.

Historically, Wisconsin courts have refused to enforce bylaw amendments in fraternal benefit society insurance policies that impair the benefits promised, but have enforced subsequently enacted bylaws that do not affect material changes to the policies. *See United Order of Foresters v. Miller,* 190 N.W. 197, 202 (Wis. 1922) (reviewing early decisions). Plaintiffs rely on language in *Wuerfler v. Trustees of Grand Grove of Wisconsin Order of Druids,* 92 N.W. 433, 435 (Wis. 1902) to suggest a broader rule of what Wisconsin courts have considered unreasonable alterations of a contract by bylaw amendment:

> Plaintiff did not possess unlimited authority to change its plan of insurance, giving the change retroactive effect, under the reserve power, made a part of the insurance contract, to make changes in the rules, by-laws and regulations of the order. Such a reserve power is held to warrant only reasonable variances of insurance contracts, variances required, in the judgment of the order, in those matters of detail necessary or advisable in carrying out efficiently the fundamental principle or scheme of insurance, not changes destroying it. . . . It is laid down as elementary that attempted changes in insurance contracts between benefit societies and their members, under the

> reserve power to amend by-laws, rules and regulations, which are manifestly unfair, are void, it being presumed that in making such reservation both parties contemplated only reasonable variances.

However, consistent with W.S.A. § 632.93, *Wuerfler* concerned a reduction in benefits payable to a surviving spouse. *Id.* at 435. Indiana's policy toward enforcement of subsequently enacted bylaws is substantially similar, requiring that amendments be reasonable. *See Supreme Lodge Knights of Honor v. Bieler,* 105 N.E. 244, 248 (1914).

The decisions of Alabama state and federal courts enforcing arbitration clauses in subsequently enacted bylaws in the *Woodmen of the World* line of cases are especially persuasive. *See Woodmen of the World Life Insurance Society v. Harris,* 740 So.2d 362 (Ala. 1999); *Woodmen of the World Life Insurance Society v. White*, 35 F.Supp.2d 1349 (M.D.Ala. 1999); *Woodmen of the World Life Insurance Society v. Johnson*, 23 F.Supp.2d 1344 (S.D. Ala. 1998), *Clayton v. Woodmen of the World Life Insurance Society,* 981 F.Supp. 1447 (M.D.Ala. 1997). Having considered these decisions, the court concludes that the arbitration provision added to AAL's insurance contracts is valid and enforceable; that it was created in accordance with principles of contract formation; and that it is not unconscionable.

Plaintiffs' contentions that the arbitration provision is invalid for lack of definiteness, consideration or mutual assent are misplaced. The plaintiffs have failed to highlight any significant ambiguity in the certificate of membership and insurance, riders, endorsements, applications, declarations of insurability, Articles of Incorporation, Bylaws, or amendments, which constitute the insurance

contract, that would create uncertainty as to the authority of AAL's Board of Directors to amend corporate Bylaws.

Citing the Restatement (Second) of Contracts, § 33 (1981), plaintiffs further argue that the terms their insurance contracts are uncertain because they are left open. That argument is one for the legislature, not this court. Wisconsin and Indiana law provide that fraternal benefit contracts must state that the insurance certificate, bylaws, and subsequent amendments are part of the contract. See W.S.A. § 632.93(1); W.S.A. § 614.01; Ind. Code § 27-11-6-4; Ind. Code § 27-11-1-7. Articles VIII and IX of AAL's Articles of Incorporation grant its Board of Directors power to make, repeal or amend bylaws as well as articles of incorporation. Section 4 of AAL's Bylaws states that future bylaw amendments are incorporated into the contract of insurance. The law requires this redundancy, and this court finds that this does not create an ambiguity that threatens the validity of the contracts at issue.

Plaintiffs' contention that the contracts are invalid for lack of consideration fails also. Plaintiffs have not demonstrated that consideration was lacking when the contracts were formed and have not cited any authority to support the proposition that independent consideration is required when a fraternal organization amends its bylaws while maintaining benefits promised in a certificate of insurance. Moreover, the dispute resolution provision adopted by AAL in 1999, will cause AAL to incur mediation or arbitration fees and expenses and make the results of arbitration binding without recourse to an appeal. *See Michalski v. Circuit City Stores Inc.*, 177 F.3d 634, 636 (7th Cir. 1999) ("Circuit City's promise to be bound by the arbitration process itself serves as mutual consideration here."). *Compare Gibson*, 121 F.3d at 1130. *See also Paint*

Shuttle, Inc. v. Continental Cas. Co., 733 N.E.2d 513, 523 (Ind. App. 2000) ("To constitute consideration, there must be a benefit accruing to the promisor or a detriment to the promisee. In other words, consideration consists of a bargained for exchange.") (citations omitted).

The argument that the bylaw amendment was not contemplated at formation, rendering the insurance contract invalid for lack of mutual assent, likewise fails. Plaintiffs agreed to be bound by subsequent change to AAL's articles of incorporation and the bylaws, so long as any change does not reduce, destroy or diminish benefits AAL promises to pay. The right to seek redress in court is not a "benefit" of the contract that AAL provides to its members, *see e.g.* Ind. Code § 27-11-6-1, therefore the amendment is not outside the scope of that agreement. Moreover, the pre-amendment bylaws provided a default limitations period to bring an action in court – in effect, restricting legal remedies, not creating a right to file suit.

Plaintiffs urge the court to refuse to enforce the arbitration provision on the grounds that it is unconscionable. They contend it is procedurally unconscionable because it was imposed unilaterally, while plaintiffs had no bargaining power or meaningful choice. They argue that it is oppressively one-sided, restricts legal remedies, prohibits class actions, and deprives plaintiffs of their right to a jury trial, and was applied retroactively, rendering it substantively unconscionable.

To determine whether a contract provision is unconscionable, Indiana courts ask whether "a great disparity in bargaining power exists between the parties which leads the weaker to sign a contract unwillingly or without being aware of its terms." *White River Conservancy Dist. v.*

Commonwealth Engineers, Inc. 575 N.E.2d 1011, 1017 (Ind. App. 1991). The contract must be such as no sensible person not under delusion, duress or in distress would make, and such as no honest and fair person would accept. *Id.* A contract is not unenforceable merely because one party enjoys advantages over another. *Id.* Wisconsin courts take the same approach, requiring both procedural and substantive unconscionability. *See Leasefirst v. Hartford Rexall Drugs, Inc.,* 483 N.W.2d 585, 587-88 (Wis. App. 1992).

The court is not persuaded that the insurance contracts are unconscionable. It can hardly be said that the retroactive application of a bylaw amendment is procedurally unconscionable where members of the fraternal society voluntarily entered contracts stating that they incorporate bylaws and contemplates "[a]ny changes." Moreover, to characterize the bylaw amendment at issue as unilateral, without any bargaining power or meaningful choice on plaintiffs part, disregards AAL's representative form of government. *See* W.S.A. § 614.01.

That the arbitration provision is effective retroactively does not render it unenforceable. *See R.J. O'Brien & Assoc., Inc. v. Pipkin,* 64 F.3d 257, 260-61 (7th Cir. 1995); *Geldermann, Inc. v. Commodity Futures Trading Commission,* 836 F.2d 310, 317 (7th Cir. 1987). The limitation on relief such that attorney's fees, exemplary, extra-contractual or punitive damages are not available remedies do not render a contract unconscionable. *See Baravati v. Josephthal, Lyon & Ross, Inc.* 28 F.3d 704, 709 (7th Cir. 1994) ("Short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes . . . and surely can stipulate

that punitive damages will not be awarded."). Likewise, the preclusion of class actions cannot be unconscionable. To the contrary, courts may not order class arbitration if the arbitration provision is silent on class treatment. *See Champ v. Siegel Trading Co., Inc.*, 55 F.3d 269, 275 (7th Cir. 1995). And, the requirement that disputes be submitted to arbitration does not violate the right to a jury trial, because that right is waivable. *See Koveleskie v. SBC Capital Markets, Inc.*, 167 F.3d 361, 368 (7th Cir. 1999).

Plaintiffs also contest the enactment of the bylaw amendment, asserting that AAL had to modify its Articles of Incorporation for the board to take written action by 2/3 of the directors to amend the bylaw. Plaintiffs request discovery on that issue. In a declaration signed under penalty of perjury, David Westmark, Assistant General Counsel for AAL, submits a copy of the board resolution to amend the bylaws, indicating that the amendment was approved by unanimous written consent. (Westmark Decl. ¶ 3, Exhibit B) Written action by unanimous consent is a valid method of action without a meeting under Wisconsin law. W.S.A. § 181.0821(1); W.S.A. § 614.074(4). Any amendment to the articles of incorporation to permit action without a two thirds vote, in accordance with sentence two of W.S.A. § 181.0821(1), is therefore irrelevant, and discovery on that issue is unwarranted.

Plaintiffs submit that AAL did publish proper notice of the bylaw amendments. While the synopsis that AAL provided to its members arguably does not comply its bylaw requirement that notice be published, the July/August synopsis that appeared in the *Correspondent* does comport with Wisconsin law. *See* Wis. Stat. § 614.12(4) ("[A] copy of the bylaws and any amendments to them shall be filed with the commissioner promptly

after adoption, and notice of amendments to the bylaws shall be given promptly to members."). And, the published summary is sufficiently detailed to substantially comply with AAL's bylaw. *See* Fletcher Cyc Corp § 4179 (2001); *Franklin County Bldg. Ass'n v. Cravens,* 2 N.E.2d 122 (Ill. App. 1936); *Central Kansas Credit Union v. Mutual Guar. Corp.,* 886 F.Supp. 1529, (D.Kan. 1995).

The statutes governing insurance contracts issued by fraternal benefit societies address the fairness concerns underlying the doctorine [sic] of unconscionability, i.e., they require that the policy of insurance or certificate state that current and future bylaws are incorporated into insurance; that notice of bylaw amendments be sent to members; and that bylaw changes not destroy benefits promised under the contract. Each requirement is met in this case.

Plaintiffs have not raised any matters relevant to the existence of an agreement to arbitrate that requires discovery. *See Champ,* 55 F.3d 276 ("In a proceeding under section 4, which consists of a preliminary determination on whether the parties' intended an issue to be referred to arbitration, a district court could order discovery pursuant to Fed. R. Civ. P. 26 on matters relevant to the existence of an arbitration agreement"); *Hill v. Gateway 2000,* 135 F.3d 1147, 1150-51 (7th Cir. 1997) (enforcing arbitration clause notwithstanding contention that it is part of a scheme to defraud) (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 87 S.Ct. 1801 (1967)). As there is no factual issue concerning whether plaintiffs entered into the fraternal benefit contract, the FAA does not require a jury trial. *See Saturday Evening Post v. Rumbleseat,* 816 F.2d 1191, 1196 (7th Cir. 1987); *Matterhorn, Inc. v. NCR Corporation,* 763 F.2d 866, 873 (7th Cir. 1985); *Brook Mays*

Music Co. v. National Cash Register Co., 838 F.2d 1396, 1399 (5th Cir. 1988).

Now, therefore,

IT IS ORDERED that defendant's motion to compel arbitration is granted.

IT IS FURTHER ORDERED that defendants' motions for leave to file a response to supplemental authority is granted.

IT IS FURTHER ORDERED that the case is dismissed without prejudice, for administrative purposes.

Dated at Milwaukee, Wisconsin, this 31st day of October, 2001.

BY THE COURT
/s/ C.N. Clevert /s/ _____
C.N. CLEVERT
U.S. District Judge

This 1st day of November, 2001, pursuant to Rule 77(d) Federal Rules of Civil Procedure, copies of this document were mailed by [Illegible] to the following parties:

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLENN A. HAWKINS, and NEDRA J. HAWKINS, on behalf of themselves and others similarly situated,	)	
Plaintiffs	)	**No. 3:00cv0454 AS**
v.	)	
AID ASSOCIATION FOR LUTHERANS,	)	
Defendant	)	

MEMORANDUM AND ORDER

Taking note of the entire record in this case, and particularly the proceedings held in open court on September 21, 2000, as well as the filings that were made on October 2, 2000, the court is now prepared to rule on the questions presented. The first question has to do with the remand of this case back to the state court in Wabash County. That remand is **DENIED**. Given the appropriate spin on the plaintiffs' complaint clearly more than $75,000.00 is at issue. An object lesson in this regard is the opinion of Chief Judge Posner in *Herremans v. Carrera Designs, Inc.*, 157 F.3d 1118 (7th Cir. 1998).

The next question is whether this case over which this court has jurisdiction under 28 U.S.C. § 1332 should be transferred to similar litigation involving this defendant pending in the U.S. District Court for the Eastern District of Wisconsin in Milwaukee. One of the principal legislative reasons for Congress' enactment of 28 U.S.C. § 1404(a) is

the appropriate use of judicial resources which are in very limited supply. In the papers, the outline of similar litigation pending in other federal courts is revealing and this case literally calls out for definitive decision-making in one, not several forums.

This court is thus persuaded that this case be transferred instanter to the United States District Court for the Eastern District of Wisconsin in Milwaukee. **IT IS SO ORDERED.**

DATED: October 4, 2000

/s/ Allen Sharp
ALLEN SHARP,
JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JUDGMENT IN A CIVIL CASE

MARTIN F. RADMER, et al., Plaintiffs, v. AIΓ ASSOCIATION FOR LUTHERANS, Defendant.	)	Case No. 99-0961-CV-W-4 (Filed Apr. 27, 2000)

____ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_X_ **Decision by Court**. This action came before the Court. The issues have been determined and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that

Plaintiffs' Amended Motion to Remand is granted;

Plaintiffs' request for attorneys' fees and expenses incurred in preparing their Amended Motion to Remand is denied;

all other pending motions are denied as moot; and

this case is remanded to the Circuit Court of Jackson County, Missouri.

April 27, 2000
Date

Patricia L. Brune
Clerk
/s/ Tracy L. Diefenbach
(by) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

MARTIN F. RADMER, et al., Plaintiffs,	)	
v.	)	No. 99-0961-CV-W-9-4
AID ASSOCIATION FOR LUTHERANS, Defendant.	)	

ORDER GRANTING PLAINTIFFS' AMENDED MOTION TO REMAND

(Filed Apr. 27, 2000)

On August 5, 1999, plaintiffs Martin F. Radmer, Gerald W. Brendenberg, Joanne Just, and Christopher E. Schroeder filed this action individually, and on behalf of all others similarly situated, against defendant Aid Association for Lutherans (AAL) in the Circuit Court of Jackson County, Missouri. Plaintiffs bring various common law tort and contract claims in connection with AAL's sale of insurance policies.

Defendant filed a Notice of Removal, removing the case to this court pursuant to the federal removal statute, 28 U.S.C. § 1446. In the Notice of Removal, defendant

asserts that the parties are diverse and that the amount in controversy exceeds $75,000.

Plaintiffs move to remand this case to the Circuit Court of Jackson County, Missouri.

I.

FACTS

AAL is a non-profit membership organization offering life insurance coverage to its participants. Plaintiffs are members and have life insurance contracts with AAL. It is undisputed that there is diversity of citizenship among the parties.

Plaintiffs allege that AAL engaged in a fraudulent scheme to market and sell Horizon adjustable life insurance policies in a deceptive and misleading manner. Plaintiffs contend they were damaged through payment of unexpectedly increased premiums, forced acceptance of reduced life insurance coverage, decreased cash values, and loss of coverage.

In 1988, plaintiff Radmer owned four "paid up" AAL certificates with a cash value of $4,339.99. Radmer exchanged these certificates for a $25,000 Horizon policy. Plaintiff Bredenberg had two certificates valued at $3,176.67. He exchanged these certificates for a $50,000 Horizon policy. Plaintiff Just owned one certificate worth $1,028.86. She exchanged this certificate for a $50,000 Horizon policy, but subsequently reduced its face value to $20,000. Plaintiff Schroeder had two certificates with a cash value of $1,174.93. Schroeder exchanged these certificates for a $75,000 Horizon certificate, but subsequently increased its cash value to $125,000.

In their Petition, plaintiffs seek compensatory damages, punitive damages, and attorneys' fees in unspecified amounts. Plaintiffs also ask for declaratory and injunctive relief, including "creati[ng] an appropriate claims resolution procedure for the resolution of individual issues, if any, remaining after resolution of the class issues." Prayer for Relief ¶ (f). David L. Westmark, AAL's Assistant Vice-President and Assistant General Counsel, estimates that any claims resolution procedure would cost AAL at least $17.5 million.

II.

STANDARD OF REVIEW

For a defendant to remove an action to federal court, the case must be within the original jurisdiction of the federal court. 28 U.S.C. § 1441(a). 28 U.S.C. § 1332 provides that "district courts shall have original jurisdiction [in diversity cases] where the matter in controversy exceeds the sum or value of $75,000." Compensatory damages, the value of injunctive relief, punitive damages, and attorneys' fees are all considered in determining whether the amount in controversy requirement has been satisfied. *See Allison v. Security Benefit Life Ins. Co.,* 980 F.2d 1213, 1215 (8th Cir. 1992); *Capitol Imdem. Corp. v. Miles,* 978 F.2d 437, 438 (8th Cir. 1992); *Burns v. Massachusetts Mut. Life Ins. Co.,* 820 F.2d 246, 248 (8th Cir. 1987).

Whether the amount in controversy required by § 1332 is satisfied must be determined on the basis of the record at the time of removal. *See St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 303 U.S. 283, 292 (1938). The party seeking removal and opposing remand has the

burden of establishing that jurisdiction is proper. *See In re Business Men's Assurance Co. of Am.,* 992 F.2d 181, 183 (8th Cir. 1993).

The Eighth Circuit Court of Appeals has not addressed the issue of what burden of proof a removing defendant must satisfy when, as in this case, the plaintiff has not specified a total damages amount in the complaint. *See Peterson v. BASF Corp.,* 12 F. Supp.2d 964, 968 (D. Minn. 1998); *Gilmer v. Walt Disney Co.,* 915 F. Supp. 1001, 1006 (W.D. Ark. 1996). However, district courts within the Eighth Circuit have adopted the view of other Circuit Courts of Appeal that in a diversity case, where the plaintiff has not specified the total amount of damages in the complaint, the removing defendant has the burden to prove by a preponderance of the evidence that the amount in controversy is greater than $75,000. *See Peterson,* 12 F. Supp.2d at 968; *Gilmer,* 915 F. Supp. at 1006-07 (citing decisions of the Fifth, Sixth, Ninth, and Eleventh Circuit Courts of Appeal).

A defendant's burden to establish the jurisdictional amount by a preponderance of the evidence is satisfied if it is facially apparent from the complaint that the plaintiff claims damages exceeding $75,000. *See Gilmer,* 915 F. Supp. at 1006-07; *De Aquilar v. Boeing Co.,* 11 F.3d 55, 57 (5th Cir. 1993). Here, because plaintiffs have not specified a precise dollar amount for all of the damages that they claim to have suffered, it is not facially apparent from plaintiffs' Petition that the amount in controversy likely exceeds $75,000.

Where the allegations in the complaint alone are insufficient, federal courts have looked to a variety of sources to determine the amount in controversy, including

deposition testimony, answers to interrogatories, statements by counsel, stipulations, settlement offers, and other correspondence between the parties. See *Rahwar v. Nootz,* 863 F. Supp. 191, 192 (D.N.J. 1994) and the cases cited therein. *See also Gilmer,* 915 F. Supp. at 1007 ("If it is not facially apparent from plaintiff's complaint that the amount in controversy likely exceeds $75,000, a removing attorney may set forth facts . . . that support a finding of the requisite amount.") (quoting *Allen v. R. & H. Oil & Gas Co.,* 63 F.3d 1326, 1335 (5th Cir. 1995)). However, federal courts must strictly construe the federal removal statute and "resolve all doubts about federal jurisdiction in favor of remand." *In re Business Men's,* 992 F.2d at 183.

III.

DISCUSSION

In diversity class actions, the general rule is that putative class members may not aggregate the value of their claims to satisfy the requisite amount in controversy.[1] *See Snyder v. Harris,* 394 U.S. 332, 338 (1969). Rather, for federal subject matter jurisdiction to attach under § 1332, each member of the class must individually establish the minimum jurisdictional amount. *See Zahn v. International Paper Co.,* 414 U.S. 291, 294-95 (1973). The putative class members' claims may be aggregated to satisfy the jurisdictional prerequisite *only if* they have "'unite[d] to enforce a single title or right, in which they

[1] For the purpose of ascertaining whether federal jurisdiction is present, I will treat this putative class action as if it has been certified. *Visintine v. Saab Auto. A.B.,* 891 F. Supp. 496, 497 n.3 (E.D. Mo. 1995).

have a common and undivided interest.'" *Id.* (quoting *Troy Bank v. G.A. Whitehead & Co.*, 222 U.S. 39, 40-41 (1911)).

Plaintiffs argue that this court does not have subject matter jurisdiction under § 1332 because the amount in controversy requirement is not satisfied as to every plaintiff and every potential class member. Plaintiffs also contend that there is no supplemental jurisdiction under 28 U.S.C. § 1367 because "the rule requiring each Plaintiff and class member to meet the jurisdictional requirement cannot be circumvented through the use of the supplemental jurisdiction statute." Pl's Am. Mot. ¶ 3.

AAL responds that, because 1) plaintiffs' request for injunctive relief and 2) plaintiffs' claim for punitive damages may be aggregated to satisfy the amount in controversy requirement, this court has diversity jurisdiction over all the plaintiffs and potential class members. In the alternative, AAL argues that this court has supplemental jurisdiction over any plaintiffs that cannot independently satisfy the amount in controversy requirement.[2]

Although the Eighth Circuit Court of Appeals has not directly addressed the issues raised in plaintiffs' motion, I have concluded that this court does not have jurisdiction under either § 1332 or § 1367, and this case will be remanded to the Circuit Court of Jackson County, Missouri.

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[2] For purposes of this motion, I will assume, without deciding, that plaintiffs' request for injunctive relief places the face value of their insurance policies at issue. Therefore, the amount in controversy is assumed to be at least $125,000 as to plaintiff Schroeder, which satisfies § 1332, but only $20,000 as to plaintiff Just, which falls far short of the jurisdictional prerequisite.

A. The Cost of Injunctive Relief May Not Be Aggregated

AAL argues that this court must apply the total cost to AAL of establishing claims resolution procedures toward the amount in controversy requirement because "plaintiffs have asserted a common and undivided right" to this relief. Def's Resp., at 2. Because the total cost of these procedures may approach 17.5 million, AAL contends that this request for injunctive relief satisfies § 1332.

The Eighth Circuit Court of Appeals has held that "class members in class action suits seeking a monetary recovery on insurance contracts do not present common claims that can be aggregated in determining whether the jurisdictional amount is present." *Burns,* 820 F.2d at 250 (citing with approval cases decided by the Fifth, Sixth, and Seventh Circuit Courts of Appeal); *see also Metzler v. Nationwide Mut. Fire Ins. Co.,* 1995 WL 938601, at *1 (E.D. Mo. Nov. 21, 1995) ("[C]laims of putative class members based on separate insurance policies cannot be aggregated."). Further, because the underlying claims may not be aggregated, the costs to a defendant of complying with court-ordered injunctive relief may not be viewed as a whole; rather, a defendant "is deemed to face multiple claims for injunctive relief, each of which must be separately evaluated." *In re Brand Names Prescription Drugs Antitrust Litig.,* 123 F.3d 599, 610 (7th Cir. 1997) ("The test, we repeat, is the cost to each defendant of an injunction running in favor of one plaintiff, otherwise the nonaggregation rule would be violated."); *see Snow v. Ford Motor Co.,* 561 F.2d 787, 790 (9th Cir. 1977) ("Given *Snyder,* the proper focus in this case is not influenced by the type of relief requested, but rather continues to depend on the nature and value of the right asserted."); *Lonnquist v. J.C.*

Penny [sic] *Co.*, 421 F.2d 597, 599 (10th Cir. 1970); *Blair v. Source One Mortgage Servs. Corp.*, 925 F. Supp. 617, 622-24 (D. Minn. 1996) (citing cases and recognizing nonaggregation of cost of injunctive relief as majority rule); *Commercial Coverage, Inc. v. Paradigm Ins. Co.*, 998 F. Supp. 1088, 1092 (E.D. Mo. 1998).

Nevertheless, AAL contends that, because plaintiffs have a "single, undivided interest" in claims resolution procedures, the nonaggregation rule does not apply to plaintiffs' requested injunctive relief. AAL's argument must be rejected. The "integrated right" or "common fund" exception set forth in *Snyder* and *Zahn* is extremely limited and is invoked only in "'paradigm cases'" "'which involve a single indivisible res . . . . These are matters that cannot be adjudicated without implicating the rights of everyone involved in the res.'" *Gilman v. BHC Securities, Inc.*, 104 F.3d 1418, 1423 (2d Cir. 1997) (quoting *Bishop v. General Motors Corp.*, 925 F. Supp. 294, 298 (D.N.J. 1996)); *see Colon v. Rent-A-Center, Inc.*, 13 F. Supp.2d 553, 559 (S.D.N.Y. 1998); *Ferris v. General Dynamics Corp.*, 645 F. Supp. 1354, 1364 (D.R.I. 1986).

This case, which involves a class of individual policyholders seeking monetary and injunctive relief on separate insurance contracts, does not implicate the "common fund" exception to the nonaggregation rule. Nor do the specific claims resolution procedures requested by plaintiffs. Because the putative class members ask for a "procedure for the resolution of *individual issues,*" Prayer for Relief ¶ (f) (emphasis added), the relief sought "is but a means through which the individual claims may be satisfied, [and] the ban on aggregation [applies] with equal force." *Snow*, 561 F.2d at 790 (quoting *Barton Chem. Corp. v. Avis*

Rent A Car Sys., Inc., 402 F. Supp. 1195, 1198 (N.D. Ill. 1975)).

Therefore, the cost to AAL of plaintiffs' requested injunctive relief may not be aggregated under § 1332. Because the potential cost of class resolution procedures does not approach $75,000 as to each class member, *see* Pl's Rep. to Def's Supp. Auth., at 3 ("[U]sing AAL's own numbers, its cost of the administrative procedure would be only $12.50 per class member."), plaintiffs' claims for injunctive relief do not satisfy the amount in controversy requirement.

B. Punitive Damages May Not Be Aggregated

AAL also asserts that, because "plaintiffs have a common and undivided interest in punitive damages, [t]his court should therefore apply the full amount of punitive damages against each plaintiff in determining the amount in controversy." Def's Opp., at 9.

As with AAL's position on injunctive relief, AAL's argument is misplaced and is "based on [an] erroneous test[ ] of what constitutes a 'single title or right' in 'a common and undivided interest' suitable for aggregation." *Visintine v. SAAB Auto. A.B.*, 891 F. Supp. 496, 499 (E.D. Mo. 1995). Courts must focus on the nature of the right asserted, not the type of relief sought. *Id.* Where the putative class members' underlying claims are separate and distinct and not subject to aggregation, as in this case, *see Burns*, 820 F.2d at 250, punitive damages must be considered separate and distinct. *See Gilman*, 104 F.3d at 1230; *Visintine*, 891 F. Supp. at 498; *Bernard v. Gerber Food Prods. Co.*, 938 F. Supp. 218, 223 (S.D.N.Y. 1996); *Pierson v. Source Perrier, S.A.*, 848 F. Supp. 1186, 1189

(E.D. Pa. 1994). "[T]o hold that punitive damages could be aggregated even where actual damages could not would eviscerate the holdings of *Snyder* and *Zahn* and would run counter to the strict construction of the amount-in-controversy requirement those cases mandate." *Visintine,* 891 F. Supp. at 499.

Further, although the putative class members may share an interest in receiving punitive damages, "this has nothing to do with whether – prior to litigation – they jointly held a single title or right in which each possessed a common and undivided interest." *Gilman,* 104 F.3d at 1430.

> [T]hat the members of the putative class have filed a single punitive damages claim does not mean that their rights are suddenly joint and undivided rather than individual . . . . [R]ather, each potential class member could advance a separate punitive damages claim in a separate lawsuit without affecting the class claim. It is thus readily apparent that [the class] ha[s] chosen to proceed with a single punitive damages claim . . . for the sake of economy and convenience, and thus fall[s] squarely within the non-aggregation rule of *Zahn.*

Hasek v. Chrysler Corp., 1996 WL 48602, at *4 n. 5 (N.D. Ill. Feb. 5, 1996).

In this case, the individual class members could bring separate claims seeking punitive damages without implicating the rights of other class members. *See Bishop,* 925 F. Supp. at 298. Therefore, plaintiffs' interest in punitive damages is not common and undivided among all class members and cannot be considered a single,

indivisible res justifying aggregation of their claims. *See Gilman,* 104 F.3d at 1430.

Therefore, because plaintiffs' unspecified demand for punitive damages cannot be aggregated and because AAL has failed to demonstrate that each class member's pro rata share would meet the jurisdictional prerequisite, plaintiffs' punitive damages claims do not satisfy the amount in controversy requirement.

C. This Court Cannot Exercise Supplemental Jurisdiction Over Class Members Who Cannot Independently Satisfy the Amount in Controversy Requirement

AAL asserts that, because this court has original jurisdiction as to plaintiff Schroeder, this court must exercise supplemental jurisdiction pursuant to § 1367 over the claims of all class members who do not independently satisfy the amount in controversy requirement of § 1332.

Title 28 U.S.C. § 1367(a) provides: "[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." Subsections (b) and (c) set forth certain mandatory and discretionary exceptions to a federal district court's exercise of supplemental jurisdiction. Diversity class actions are not mentioned in the statute.

AAL contends that the plain language of § 1367, enacted as part of the Judicial Improvements Act of 1990, supercedes *Zahn's* mandate that each class member

independently meet the jurisdictional amount in controversy and permits this court, once one named plaintiff satisfies the jurisdictional minimum, to permit " 'the other named plaintiffs and the unnamed class members [to] . . . piggyback on that plaintiff's claim.' " Def's Opp., at 15 (quoting *In re Brand Name,* 123 F.3d at 607).

AAL supports its position by arguing 1) Rule 23 class actions are not among the enumerated exceptions to the exercise of supplemental jurisdiction set forth in § 1367(b); and 2) in a putative class action, the claims of all potential class members comprise the "same case or controversy." While AAL acknowledges that the legislative record shows that Congress did not intend to overrule *Zahn,* it asserts that this court cannot resort to legislative history because the statute's text clearly and unambiguously requires the exercise of supplemental jurisdiction in this case.

Although the Fifth and Seventh Circuit Courts of Appeal have adopted AAL's interpretation, the Tenth Circuit Court of Appeals reached the opposite conclusion based on the statute's plain language, holding that "§ 1367(a) and (b) can be read literally, and unambiguously, to require each plaintiff in a class action diversity case to satisfy the *Zahn* definition of 'matter in controversy' and to individually meet the $75,000 requirement." *Leonhardt v. Western Sugar Co.,* 160 F.3d 631, 640 (10th Cir. 1998). The court reasoned that the "original jurisdiction" required to invoke § 1367 must be defined in light of § 1332 and *Zahn.* In other words, a federal district court does not have "original jurisdiction" so as to permit the exercise of supplemental jurisdiction unless every class member satisfies § 1332 as interpreted in *Zahn. Id.* at 639-40.

The Third Circuit Court of Appeals and the majority of district courts agree that § 1367 does not overrule *Zahn*. *See Meritcare Inc. v. St. Paul Mercury Ins. Co.,* 166 F.3d 214, 222 (3d Cir. 1999); *Leonhardt,* 160 F.3d at 639 n. 5 (citing cases and recognizing its position as the majority rule); *In re Potash Antitrust Litig.,* 866 F. Supp. 406, 413 (D. Minn. 1994) (citing cases). Because both interpretations of § 1367 are reasonable, I have concluded that the statute is sufficiently ambiguous to permit this court to consult the legislative history to ascertain Congress' intent as to the scope of § 1367. *See Leonhardt,* 160 F.3d at 638 ("[A] split in the circuits is, in itself, evidence of the ambiguity of a statutory phrase.") (citation omitted); *see also Breedlove v. Earthgrains Baking Cos.,* 140 F.3d 797, 799 (8th Cir. 1998) (unless "it is not possible to construe [a statute] in more than one reasonable manner," the statute is ambiguous and the court must examine legislative history).

The legislative history conclusively demonstrates that Congress did not intend to overrule *Zahn* and expand federal jurisdiction by abrogating the rule that each class member must satisfy the $75,000 requirement of § 1332. The House Report accompanying the Judicial Improvements Act, which was adopted by the Senate Judiciary Committee, provides that § 1367 "is not intended to affect the jurisdictional requirements of 28 U.S.C. § 1332 in diversity-only class actions, as those requirements [have been] interpreted." H.R. Rep. No. 101-734, at 29 (1990). The Report also states that district courts must not exercise supplemental jurisdiction "when doing so would be inconsistent with the jurisdictional requirements of the diversity statute." *Id.* at 28. Even the Fifth and Seventh Circuit Courts of Appeal acknowledge that the legislative

record shows Congress did not intend to abrogate *Zahn*. *See, e.g., In re Abbott Labs.*, 51 F.3d at 528.

Even if I concluded that the language of § 1367 unambiguously supports AAL's position, I would nevertheless resort to legislative history because AAL's interpretation would "produce results demonstrably at odds with the intentions of [§ 1367's] drafters." *United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 242 (1989). "The rule proposed by defendants [requiring supplemental jurisdiction] . . . is an unauthorized and improvident expansion of federal jurisdiction. The rule would eviscerate the fundamental rules of subject matter jurisdiction and could lead to absurd results." *Ren-Dan Farms, Inc. v. Monsanto Co.*, 952 F. Supp. 370, 376 (W.D. La. 1997). I agree that, because a federal court's jurisdiction is limited and because jurisdictional statutes are to be narrowly construed, *see In re Business Men's*, 992 F.2d at 183, requiring a federal court to exercise supplemental jurisdiction over every diversity class action in which only one class member satisfies the jurisdictional prerequisite would unduly expand federal subject matter jurisdiction and lead to absurd results.

The Supreme Court's recent decision in *Free v. Abbott Laboratories, Inc.*, 2000 WL 339510 (U.S. April 3, 2000), does not alter my conclusion. In *Free*, the Court, in a per curium [sic], 4-4 summary disposition, affirmed the Fifth Circuit Court of Appeals' conclusion that a federal district court must exercise supplemental jurisdiction over class members who cannot individually meet the amount in controversy requirement. However, the Court did not address the merits of this issue, did not resolve the split of authority, and did not overrule *Zahn*. Therefore, *Free* provides little, if any, authority for AAL's position. *See Edelman v. Jordan*, 415 U.S. 651, 670-71 (1974).

Finally, in what can fairly be characterized as a last act of desperation, AAL contends that this court has implicitly recognized it has jurisdiction over this case because it has retained jurisdiction in *Adams v. Kansas City Life Insurance Co.*, 98-1053-CV-W-9-6. Although the cases are factually similar regarding the defendant insurance company's alleged conduct, the plaintiffs in *Adams* specifically asserted that their damages exceeded $75,000 per person. *See* Def's Ex. D, at ¶ 25. This contention was never challenged and was factually supported. Therefore, the court's retention of jurisdiction in *Adams* is irrelevant to this case and provides no support for AAL's position.

Therefore, because plaintiffs' claims may not be aggregated to satisfy § 1332 and because this court may not exercise supplemental jurisdiction pursuant to § 1367 over class members who cannot meet the $75,000 amount in controversy requirement, this case will be remanded to the Circuit Court of Jackson County, Missouri.

IV.

CONCLUSION

Accordingly, it is ORDERED that:

1) plaintiffs' Amended Motion to Remand (Doc. 12) is granted;

2) plaintiffs' request for attorneys' fees and expenses incurred in preparing their Amended Motion to Remand is denied;

3) all other pending motions are denied as moot; and

4) this case is remanded to the Circuit Court of Jackson County, Missouri.

/s/ Gary A. Fenner
GARY A. FENNER
UNITED STATES
DISTRICT JUDGE

Kansas City, Missouri

April 27, 2000.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

AID ASSOCIATION FOR LUTHERANS Petitioner MARTIN F. RADMER, GERALD W. BREDENBERG, JOANNE JUST, CHRISTOPHER E. SCHROEDER, and CHARLES SATTLER Respondents	)	Civil Action No.: 99-C-1205

NOTICE OF RULING BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI THAT THERE IS NO SUBJECT MATTER JURISDICTION OVER THE CLAIMS ASSERTED BY RESPONDENTS RADMER, BREDENBERG, JUST AND SCHROEDER AGAINST AID ASSOCIATION FOR LUTHERANS

(Filed Jun. 19, 2000)

As the Court is aware, there was parallel litigation between Aid Association for Lutherans ("AAL") and Respondents Martin F. Radmer, Gerald W. Bredenberg, Joanne Just, and Christopher E. Schroeder (the "Radmer Respondents") in the United States District Court for the Western District of Missouri. The Western District of Missouri has now ruled that there is no subject matter jurisdiction over the claims asserted by the Radmer Respondents against AAL under either 28 U.S.C. § 1332 or 28 U.S.C. § 1337. Under principles of res judicata and the doctrine of jurisdictional finality, this action must be dismissed for lack of subject matter jurisdiction.

The pending action was begun with the filing of a Petition to Compel Arbitration by Petitioner Aid Association for Lutherans ("AAL").[1] Before the filing of this action, however, there was already litigation involving the underlying transactions between these parties in the United States District Court for the Western District of Missouri. That action, captioned *Martin F. Radmer, et al v. Aid Association for Lutherans*, No. 99-0961-CV-W-9-4, ("*Radmer*") had been removed by AAL to the Western District of Missouri from the Circuit Court of Jackson County, Missouri, where it was originally filed by the Radmer Respondents. Removal jurisdiction in *Radmer* was based on 28 U.S.C. § 1332(a). See Notice of Removal attached as Exhibit B. The Radmer Respondents moved to remand the case back to state court for lack of subject matter jurisdiction.

After full consideration of the arguments submitted by all parties, Judge Gary Fenner entered an Order Granting Plaintiffs' Amended Motion To Remand on April 27, 2000. (Attached as Exhibit A). In his Order, Judge Fenner found that the court did not have subject matter jurisdiction under either § 1332 or § 1367 and remanded the case to the Circuit Court of Jackson County Missouri.

Under principles of res judicata and the doctrine of jurisdictional finality, this ruling by the Western District of Missouri is determinative of the jurisdictional issues raised in this action and mandates dismissal of this action.

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[1] The Radmer Respondents filed a Motion to Dismiss on January 14, 2000, asserting that their case must be dismissed for lack of subject matter jurisdiction.

1. The jurisdictional allegations and arguments in Radmer and AAL are identical.

A review of the jurisdictional allegations in the two cases demonstrates that AAL has premised subject matter jurisdiction in this case on the same legal and factual basis as that rejected by Judge Fenner in the Western District of Missouri:

Radmer Notice of Removal (Exhibit B)	**AAL Amended Petition to Compel Arbitration (Exhibit C)**
¶ 3. This Court has jurisdiction over this action under 28 U.S.C. § 1332 because (a) there is diversity of citizenship between the named plaintiffs and defendant, and the amount in controversy exceeds $75,000 exclusive of interest and cost [sic]; and (b) the Court also has supplemental jurisdiction over the claims of the unnamed putative class plaintiffs. ¶ 5. The amount in controversy in this action, both in aggregate and on a pro rata basis, exceeds the value of $75,000 exclusive of interest or costs. The plaintiffs seek compensatory damages, punitive damages, declaratory relief, injunctive relief, and attorneys' fees without limitation. If the plaintiffs' claims	¶ 7. Jurisdiction in this Court is based on 28 U.S.C § 1332 and 28 U.S.C. § 1367. Complete diversity exists among the parties, and the respondents seek compensatory damages, punitive damages, declaratory relief, injunctive relief, and attorneys' fees without limitation in their arbitrable disputes. If the respondents' underlying disputes are proven, the pro rata value of one or more of these requests for relief exceeds the $75,000 jurisdictional amount in controversy requirement. In addition, their claims for injunctive relief independently satisfy the amount in controversy requirement. Moreover, through respondents'

are proven, the pro rata value of one or more of these requests for relief exceeds the amount in controversy requirement of $75,000. In addition, the claims of punitive damages or attorneys' fees independently satisfy the amount in controversy requirement.	contacts with this District, they are subject to personal jurisdiction.
¶ 4. The named plaintiffs in this case and defendant AAL are of diverse citizenship. As alleged in their petition, plaintiff Martin F. Radmer is a resident and citizen of Missouri, plaintiff Gerald W. Bredenberg is a resident and citizen of Minnesota, plaintiff Joanne Just is a resident and citizen of North Dakota, and plaintiff Christopher E. Schroeder is a resident and citizen of Illinois. (Pet. ¶¶ 11-14.) Defendant AAL is a fraternal benefit society chartered under the laws of the state of Wisconsin with its principal place of business in Appleton, Wisconsin. Accordingly, under 28 U.S.C. § 1332(a)(1), this is a civil action between "citizens of different states."	¶ 5. The AAL is a fraternal benefit society chartered under the laws of the state of Wisconsin with its principal place of business in Appleton, Wisconsin. ¶ 6. Respondent Martin F. Radmer is a resident and citizen of Missouri, respondent Gerald W. Bredenberg is a resident and citizen of Minnesota, respondent Joanne Just is a resident and citizen of North Dakota, and respondents Christopher E. Schroeder and Charles Sattler are residents and citizens of Illinois. Each respondent is a member of the AAL and has a life insurance contract with the AAL.

¶ 6. Finally, even in the event that only one named plaintiffs' claims satisfy the amount in controversy requirement in a pro rata or an aggregate basis, this Court has supplemental jurisdiction over the claims of the other named plaintiffs and the unnamed putative class members under 28 U.S.C. § 1367.	¶ 8. Even in the event that only one named respondents' claims satisfy the amount in controversy requirement in a pro rata or an aggregate basis, this Court has supplemental jurisdiction over the claims of the other named respondents under 28 U.S.C. § 1367.

Each of the arguments made by AAL in this Court in support of jurisdiction has been made and rejected by the Western District of Missouri. The identity of the arguments made by AAL in this court and in the Western District of Missouri is evident from a review of the relevant filings in each of the cases. The following chart identifies the pleadings and page references where the particular argument is made by AAL in each case, together with a reference to the page in Judge Fenner's April 27, 2000 Order where the issue is addressed and ruled.

AAL's Jurisdictional Argument	*AAL* case (E.D. Wis.)	*Radmer* Case (W.D. Mo.)	April 27, 2000 Order entered by Judge Fenner (W.D. Mo.)
The Radmer Respondents' claims for injunctive relief satisfy the amount in controversy requirement.	AAL's Memorandum In Opposition to Motion to Dismiss, Or In The Alternative, Motion To Stay Or Transfer dated 2-7-00 at pages 7-12 (Attached as Exhibit. D)	AAL's Suggestions in Opposition to Amended Motion to Remand dated 11-29-99 at pages 5-12. (Attached as Exhibit E) AAL's Response to Plaintiffs' February 29 Memorandum On Remand dated 3-10-00. (Attached as Exhibit F)	Pages 7-12 (Attached as Exhibit A)
The Court has supplemental jurisdiction over any Radmer Respondents that may not satisfy the amount in controversy requirement.	AAL's Memorandum In Opposition to Motion to Dismiss, Or In The Alternative, Motion To Stay Or Transfer dated 2-7-00 at pages 13-15 (Attached as Exhibit D)	AAL's Suggestions in Opposition to Amended Motion to Remand dated 11-29-99 at pages 12-16 (Attached as Exhibit E) AAL's Motion for Leave to File Supplemental Authority In Opposition to Plaintiffs' Amended Petition to Remand dated 12-22-99. (Attached as Exhibit G)	Pages 12-17 (Attached as Exhibit A)
		AAL's Notice of the Supreme Court's Ruling Affirming Decision That the Supplemental Jurisdiction Statute Supersedes *Zahn v. International Paper Co.*, 414 U.S. 291 (1983) dated 4-7-00. (Attached as Exhibit H)	

A comparison of the filings referred to in this chart shows that identical arguments were made in this court and in the Western District of Missouri on the issue of subject matter jurisdiction. In fact, the arguments asserted by AAL in this case are essentially verbatim reiterations of the very same arguments previously made in the Western District of Missouri. After full consideration of all of AAL's arguments, Judge Fenner found that § 1332's amount in controversy requirement was not met and that there was no supplemental jurisdiction under § 1367. Judge Fenner remanded the case to state court. (Exhibit A) Judge Fenner's well-reasoned 18 page opinion addressed all of the arguments made by AAL and rejected all of them. This jurisdictional determination by Judge Fenner is final and non-appealable.[2]

2. The principles of res judicata apply to jurisdictional determinations

The principles of res judicata[3] apply to jurisdictional determinations. *Treinies v. Sunshine Mining Co.*, 308 U.S.

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[2] The inability of AAL to appeal Judge Fenner's remand order does not affect the preclusive effect of the determination. See *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F2d 634, 636 (5th Cir. 1974) ("As between two federal district courts, the inability to appeal from the order of remand does not permit the issue actually litigated and determined in the federal court in Arkansas to be relitigated in the second action.")

[3] As the Supreme Court has noted, "the preclusive effects of former adjudication are discussed in varying and, at times, seemingly conflicting terminology, attributable to the evolution of preclusion concepts over the years." *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 77 n.1 (1984) (preclusion concepts referred to collectively as "res judicata," which is often analyzed to consist of two

(Continued on following page)

66, 78 (1939) ("One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction, as well as to other issues, as well [sic] to the jurisdiction of the subject matter as of the parties."); *American Surety Co. v. Baldwin,* et al., 287 U.S. 156, 166 (1932), citing *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U.S. 522 (1931). *Okoro v. Bohman*, 164 F.3d 1059, 1062-63 (7th Cir. 1999). ("Or suppose he had brought a state-law tort suit in federal district court against one of the defendants and it had been dismissed on the ground that there was no diversity of citizenship. He could not refile the suit in federal court, even though it had been dismissed on jurisdictional grounds, because . . . a jurisdictional dismissal is res judicata on the jurisdictional issue.")

The United States Supreme Court has called this the "doctrine of jurisdictional finality." *Durfee v Duke*, 375 U.S. 106, 113 (1963). The doctrine of jurisdictional finality governs the jurisdictional issues in this case.

Judge Fenner in the Western District of Missouri has determined that there is no federal subject matter jurisdiction over the claims asserted by the Radmer

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separate preclusion concepts: claim preclusion and issue preclusion; "res judicata" has on occasion been used to narrowly mean claim preclusion). Among the terms that have been used to identify and describe the preclusive effect of a prior jurisdictional determination are: "res judicata" *Baldwin v. Iowa State Traveling Men's Ass'n.*, 283 U.S. 522 (1931); "doctrine of jurisdictional finality" *Durfee v. Duke*, 375 U.S. 106 (1063); "direct estoppel" or "estoppel by judgment" *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F2d 634 (5th Cir. 1974); and "issue preclusion/direct estoppel" (Wright & Miller, § 4418). Regardless of which particular preclusion label one applies to the April 27, 2000 Order, it is clear that the Western District of Missouri's jurisdictional ruling is determinative of the same issue in this case.

Respondents against AAL. AAL cannot relitigate that issue in this court. *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 500 (5th Cir. 1974) directly addresses the issue of the preclusive effect of a prior determination by another district court on the question of subject matter jurisdiction. As in this case, the underlying litigation in *Napper* began with the filing of an action in state court. That case, filed in Arkansas, was removed to United States District Court for the Eastern District of Arkansas, with diversity as the basis for federal jurisdiction. While the first action was still pending in Arkansas, a second action was filed in the United States District Court for the Northern District of Texas. Diversity was also the basis for federal jurisdiction in the Texas case. The Arkansas District Court found that there was no diversity jurisdiction and remanded the case to state court. The Texas court then properly dismissed the Texas case for want of jurisdiction. The Fifth Circuit affirmed the dismissal, stating:

> "Estoppel by judgment precludes the plaintiffs from successfully asserting diversity jurisdiction. The distinction between res judicata and estoppel by judgment is discussed in *Commissioner v. Sunnen*, 1948, 333 U.S. 591, 597, 598, 68 S.Ct. 715, 92 L.Ed. 898. Estoppel by judgment will not permit matters actually litigated and determined between the same parties in one proceeding to be relitigated. . . . As between two federal district courts, the inability to appeal from the order of remand does not permit the issue actually litigated and determined in the federal court in Arkansas to be relitigated in the second action."

Id. at 636-37. See also, *City Capital Resources, Inc. v. White*, 29 F.Supp 2d 334 (S.D. W.V. 1998), another case with a procedural scenario similar to the one in the

instant case. In *White*, the determination by one federal district court that there was no diversity jurisdiction precluded a second federal district court from reconsidering or relitigating the same issue. Id at 336. The court in *White* went on to state:

> "Governed by direct estoppel, however, this Court considers neither the method nor the basis of the California jurisdictional decision. With the soundness of the decision we are not here concerned. It is enough that the court did not . . . reach its decision by merely assuming the point in issue, or by deeming itself concluded by the fact that the trial court took jurisdiction. *American Surety Co.*, 287 U.S. 156, 165-66, 53 S.Ct. 98, 101, L.Ed. 231 (1932). . . . That this Court does not review the correctness of the first court's decision also is the proper rule. Otherwise, this Court would be called to sit in an appellate capacity over the California federal district court, which clearly it may not do."

Id at 336-37.

3. <u>The jurisdictional ruling by the U.S. District Court for the Western District of Missouri is res judicata in this case.</u>

The jurisdictional determination by Judge Fenner in *Radmer* precludes the reconsideration or relitigation of the jurisdictional issue in this case. As discussed above, the jurisdictional allegations and arguments in this case are identical to those made and argued in *Radmer*. Under principles of res judicata and the doctrine of jurisdictional finality, the prior ruling by the Western District of Missouri is determinative of the jurisdictional issues raised in this action. The amount in controversy requirement of 28 U.S.C. § 1332 has not been met and there is no jurisdiction

under 28 U.S.C. § 1367. AAL's Petition to Compel Arbitration must therefore be dismissed.[4]

Wherefore, for the foregoing reasons and the additional reasons set forth in the Radmer Respondents' Motion to Dismiss and Suggestions in support thereof, the Radmer Respondents request that AAL's Petition to Compel Arbitration be dismissed.

Respectfully submitted,

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[4] The Federal Arbitration Act does not create any independent federal question jurisdiction under 28 U.S.C. § 1331 or otherwise. Section 4 of the Act provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute. Therefore, there must be some other independent basis for federal jurisdiction before an order can issue. *Moses H. Cone Memorial Hospital v. Mercury Construction Company*, 460 U.S. 1, 26 (1983)

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was mailed this 14 day of June, 2000 to: David F. Oliver, Esq., and David L. Marcus, Esq., BERKOWITZ, FELD-MILLER, STANTON BRANDT, WILLIAMS & STUEVE, LLP., Two Brush Creek Blvd., Suite 550, Kansas City, Missouri 64112; and, mailed via federal express delivery to James P. Gillespie, and Mark E. McKane, Esq., KIRK-LAND & ELLIS, 655 Fifteenth Street, N.W., Washington, D.C. 20005-5793, Attorneys for Defendant.

/s/ Diane A. Nygaard
Diane A. Nygaard

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

AID ASSOCIATION FOR LUTHERANS,

Petitioner,

v.

MARTIN F. RADMER, GERALD W. BREDENBERG, JOANNE JUST, CHRISTOPHER E. SCHROEDER, and CHARLES SATTLER,

Respondents.

Case No. 99-C-1205

Copy mailed to attorneys for parties by the Court pursuant to Rule 77 (d) Federal Rules of Civil Procedure.

DECISION AND ORDER

(Filed Sep. 27, 2000)

Petitioner Aid Association for Lutherans ["AAL"], a fraternal benefit society that sells insurance and other services to its members, seeks an order from this court compelling the above-named respondents to arbitrate their claims against AAL. Each of the respondents is a member of AAL, a purchaser of life insurance through AAL, and a named plaintiff in one of two class actions filed against AAL. The class actions allege claims for fraud, breach of contract, breach of fiduciary duty, and unjust enrichment in connection with AAL's life insurance sales practices. AAL contends that its contracts with the respondents require them to arbitrate their claims, and that the class actions are in violation of these arbitration provisions.

The first class action [the "Radmer action"] was filed in Missouri state court and removed by AAL to the federal

court for the Western District of Missouri. That court, in a decision issued six months after AAL filed the case at bar, found that subject matter jurisdiction was lacking and remanded the Radmer action to state court. The other action [the "Sattler action"] was filed in Illinois state court and removed to the federal court for the Northern District of Illinois. That court transferred the Sattler action to this court (***Sattler v. AAL***, Case No. 00-C-260). Respondent Sattler has not yet answered AAL's amended petition to compel arbitration in the present case, but with AAL's consent, he has informed the court that he will file an answer within 15 days of the court's ruling on the jurisdictional objections raised by the Radmer respondents.

Now before this court is the Radmer respondents' motion to dismiss, or in the alternative, to stay or transfer AAL's amended petition to compel arbitration. Also pending are a number of other motions, which will be addressed in this decision.

I. MOTION TO DISMISS, OR IN THE ALTERNATIVE, TO STAY OR TRANSFER

The court will deny this motion, for the reasons that follow.

A. Radmer Respondents' Motion to Dismiss

The Radmer respondents claim that this court lacks subject matter jurisdiction and personal jurisdiction over them. I turn first to the question of subject matter jurisdiction. It is undisputed that diversity of citizenship exists. It is also undisputed that one of the Radmer respondents, Christopher Schroeder, has an insurance certificate with a face amount of $125,000. Thus, under 28 U.S.C. § 1332,

the court has diversity jurisdiction over Mr. Schroeder. ***See Hunt v. Washington State Apple Adver. Comm'n,*** 432 U.S. 333, 347 (1977) ("In actions seeking declaratory or injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation"); ***Guardian Life Ins. Co. of America v. Muniz***, 101 F.3d 93, 94 (11th Cir. 1996) (face value of policy established amount in controversy in insurer's action seeking cancellation of life insurance policies).

The District Court for the Western District of Missouri reached the same conclusion in its decision remanding the Radmer class action to Missouri state court. However, that court found that not all of the plaintiffs could satisfy the amount in controversy requirement, and it held that it could not exercise supplemental jurisdiction (28 U.S.C. § 1367) over the claims of the other plaintiffs. However, the court in ***Radmer*** acknowledged that the court of appeals for the seventh circuit has held that once a named plaintiff satisfies the jurisdictional minimum, a court may exercise supplemental jurisdiciton [sic] under § 1367 over the remaining class members even if their individual claims do not exceed the jurisdictional minimum. ***In re Brand Name Prescription Drugs Antitrust Lit.***, 123 F.3d 599, 607 (7th Cir. 1997). The court in ***Radmer*** was not bound by this decision, but I am.

I hold that this court has subject matter jurisdiction over Mr. Schroeder pursuant § 1332 and over the remaining respondents pursuant to § 1367.

The Radmer respondents argue that this court is bound by the ***Radmer*** court's decision under the doctrine of res judicata. Although I recognize that court's well-reasoned determination, seventh circuit precedent once

again forecloses the Radmer respondents' argument. ***Benson v. SI Handling Sys., Inc.***, 188 F.3d 780, 783 (7th Cir. 1999); ***Health Cost Controls of Ill., Inc. v. Washington***, 187 F.3d 703, 708-09 (7th Cir. 1999). These cases hold that an unappealable remand order issued under § 1447, like the ***Radmer*** court's, has no preclusive effect. The Radmer respondents reply that these authorities contradict ***Johnson Steel Street-Rail Co. v. Wharton***, 152 U.S. 252 (1894), but I may not disregard the seventh circuit's recent on-point rulings in favor of such an old case.

The Radmer respondents also assert that personal jurisdiction over them is lacking. I find that this argument, which was abandoned in their reply brief, is without merit.

B. Alternative Motion to Stay or Transfer

In the alternative to dismissal, the Radmer respondents seek a stay or a transfer back to the Western District of Missouri. That court's intervening remand decision has rendered the latter request moot. As to the former request, I find that granting a stay in this case would be inconsistent with ***Moses H. Cone Memorial Hospital v. Mercury Construction Corporation***, 460 U.S. 1 (1983).

II. OTHER MOTIONS

The Radmer respondents' motion to dismiss, or in the alternative, to stay or transfer the AAL's original petition is moot. AAL subsequently filed an amended petition, which the Radmer respondents challenged with a new

motion (discussed above). The later motion supersedes the earlier one.

The Radmer respondents' motion to extend time to answer or otherwise respond to AAL's amended petition will be granted.

I will deny the Radmer respondents' motion to delete Charles Sattler, the named plaintiff in the Illinois class action that was transferred to this court, because I believe the motion is without merit.

The court will deny AAL's motion to file a surreply in opposition to the Radmer respondents' motion to dismiss, or in the alternative, stay or transfer the amended petition. In my opinion, there was no need for a surreply, and I did not consider AAL's proposed surreply in reaching my decision.

ORDER

IT IS ORDERED that the Radmer respondents' motion to dismiss, or in the alternative, stay or transfer AAL's amended petition to compel arbitration be and hereby is denied.

IT IS ALSO ORDERED that the Radmer respondents' motion to dismiss, or in the alternative, to stay or transfer the AAL's original petition be and hereby is dismissed as moot.

IT IS FURTHER ORDERED that the Radmer respondents' motion to extend the time to answer or otherwise respond to AAL's amended petition be and hereby is granted.

IT IS FURTHER ORDERED that the Radmer respondents' motion to delete Charles Sattler as a respondent be and hereby is denied.

IT IS FURTHER ORDERED that AAL's motion to file a surreply in opposition to the Radmer respondents' motion to dismiss, or in the alternative, stay or transfer the amended petition be and hereby is denied.

IT IS FURTHER ORDERED that all respondents shall serve and file their answers to the amended petition no later than October 20, 2000.

IT IS FURTHER ORDERED that each side shall bear its own costs on these motions.

Dated at Milwaukee, Wisconsin, this 27th day of September, 2000.

/s/ Myron L. Gordon
United States
district judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

AID ASSOCIATION FOR LUTHERANS, Petitioner, v. MARTIN F. RADMER, GERALD W. BREDENBERG, JOANNE JUST, and CHRISTOPHER E. SCHROEDER, Respondents.	)	CIVIL ACTION NO. 99-C-1205

PETITION TO COMPEL ARBITRATION

[Filed Oct. 12, 1999]

1. Martin F. Radmer, Gerald W. Bredenberg, Joanne Just, and Christopher E. Schroder ("respondents") are members of the Aid Association for Lutherans ("AAL") and have contracts for life insurance with AAL. Respondents' contracts incorporate by reference the AAL Articles of Incorporation and Bylaws. The AAL Articles of Incorporation and Bylaws contain a broad mandatory arbitration provision covering all members' disputes against the AAL.

2. In clear violation of this arbitration provision, however, the respondents initiated a putative class action against the AAL in Missouri state court (which AAL has removed to the Western District of Missouri). Because arbitration is ***"the sole means"*** for AAL members to present and resolve disputes regarding their insurance policies, the AAL respectfully seeks an order from this Court:

- Enjoining respondents from pursuing the Missouri action – a clear violation of the contracts' arbitration provision; and
- Compelling respondents to arbitrate all disputes against the AAL in an arbitration proceeding in the manner described in section 12 of the AAL's Bylaws.

PARTIES

3. The AAL is a fraternal benefit society chartered under the laws of the state of Wisconsin with its principal place of business in Appleton, Wisconsin. Its mission is to bring Lutheran people together to pursue quality living through financial security, volunteer action and help for others.

4. Respondent Martin F. Radmer is a resident and citizen of Missouri, respondent Gerald W. Bredenberg is a resident and citizen of Minnesota, respondent Joanne Just is a resident and citizen of North Dakota, and respondent Christopher E. Schroeder is a resident and citizen of Illinois. Each respondent is a member of the AAL and has a life insurance contract with the AAL.

JURISDICTION AND VENUE

5. Jurisdiction in this Court is based on 28 U.S.C. § 1332 and 28 U.S.C. § 1367 (West 1999). Complete diversity exists among the parties, and the respondents seek compensatory damages, punitive damages, declaratory relief, injunctive relief, and attorneys' fees without limitation in their arbitrable dispute. If the respondents' underlying disputes are proven, the pro rata value of one or more of these requests for relief exceeds the $75,000 jurisdictional amount in controversy requirement. In addition, the

claims of punitive damages and attorneys' fees independently satisfy the amount in controversy requirement. Moreover, through respondents' contacts with this District, they are subject to personal jurisdiction.

6. Even in the event that only one named respondents' claims satisfy the amount in controversy requirement in a pro rata or an aggregate basis, this Court has supplemental jurisdiction over the claims of the other named respondents under 28 U.S.C. § 1367 (West 1999).

7. Venue is proper in this District under 28 U.S.C. § 1391 because respondents transacted business in this District and a substantial part of the events giving rise to the underlying arbitrable claims occurred in this District.

GOVERNING LAW

8. The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (West 1999), governs the enforcement of the arbitration provision within respondents' insurance contracts with AAL.

BACKGROUND

9. **Fraternal Benefit Societies.** Fraternal benefit societies – like the AAL – offer the traditional aspects of fraternal organizations together with the benefits of insurance protection. In recognition of their unique status, states regulate their activities through laws and regulations specifically designed for these societies. *See, e.g.*, 215 Ill. Comp. Stat. 5/282.1 to 5/315.7 (West 1999); Mo. Ann. Stat. §§ 378.601 to 378.645 (West 1999); Minn. Stat. §§ 64B.01 to 64B.39 (1998); N.D. Cent. Code §§ 26.1-15.1-01 to 26.1-15.1-37 (Lexis 1999); Wisc. Stat. §§ 614.01 to 614.96 (West 1999). Unlike commercial insurers, fraternal

benefit societies are not-for-profit membership organizations with a representative form of government.

10. **The Insurance Contracts.** Each of the respondents is a member of AAL and has a life insurance contract (also referred to as a benefit certificate or benefit contract) with AAL. Section 1.2 of this contract provides that the entire contract consists of the respondents' application, their certificate, and the AAL Articles of Incorporation and Bylaws. This section also recognizes that the Articles of Incorporation and Bylaws may change after the contract was issued but ensures that any changes will not reduce the benefits AAL promises to pay.

11. **The Arbitration Provision.** On March 27, 1999, the AAL Board of Directors unanimously approved binding, mandatory arbitration for any member disputes against the AAL. Under section 12, arbitration is "the ***sole means*** to present and resolve" these disputes. (AAL Bylaws § 12(a) (Ex. B).) The provision

> ***applies to all past, current and future benefit certificates***, members, insureds, certificate owners, and beneficiaries. It applies ***to all claims***, actions, disputes and grievances ***of any kind or nature whatsoever***. It includes, but is not limited to, claims based on ***breach of benefit contract***, as well as claims based on ***fraud***, misrepresentation, violation of statute, discrimination, denial of civil rights, conspiracy, defamation, and infliction of distress, against the [AAL] or its directors, officers, agents or employees.

(*Id.* § 12(b) (emphasis added).) Moreover, "***[n]o lawsuits*** or any other actions may be brought for any claims or disputes covered by this section." (*Id.* § 12(c) (emphasis added).) The AAL provided notice of the amendment to all

members through the *Correspondent*, the AAL's official publication, as required in the AAL's Bylaws. (*Id.* § 26.)

12. **The Respondents' Missouri Lawsuit.** On August 5, 1999, notwithstanding this express arbitration provision, the respondents filed a lawsuit in Missouri state court asserting claims of breach of contract, fraud, negligence, breach of fiduciary duty, and unjust enrichment against AAL in connection with the respondents' life insurance contracts with the AAL. Aug. 5, 1999 Comp., *Radmer v. Aid Ass'n for Lutherans*, No. 99 CV 21624 (Jackson Cty. Ct. Mo.) (Respondents' Missouri complaint) (Ex. C). Respondents' Missouri complaint does not inform the Missouri court of the existence of the mandatory arbitration provision. Respondents' Missouri claims, however, are precisely the types of claims that must be arbitrated under their contract.

13. On September 30, 1999, AAL removed the respondents' Missouri complaint to federal court. In doing so, AAL advised the court that it "contends that all of the plaintiffs' claims are arbitrable," and stated "that – unless plaintiffs consent to arbitrate this dispute – it will promptly seek judicial relief to compel arbitration." Sept. 30, 1999 AAL's Notice of Removal at 2 n.1, *Radmer v. Aid Ass'n for Lutherans*, Civil No. 99-0961-CV-W-9 (W.D. Mo.).

14. Respondents' Rejection of Arbitration. Respondents have implicitly and explicitly refused to arbitrate their claims. The respondents implicitly rejected arbitration by ignoring the arbitration provision and initiating litigation in Missouri state court. The respondents then explicitly refused to arbitrate their claims after the AAL directed respondents to the arbitration provision and requested arbitration.

CLAIM FOR RELIEF – THE FEDERAL ARBITRATION ACT

15. Paragraphs 1 to 14 are incorporated by reference as if fully stated herein.

16. The Federal Arbitration Act requires that the dispute between AAL and the respondents be heard in arbitration. 9 U.S.C. § 1 *et seq.* (West 1999)

17. The arbitration provision in this case plainly falls within the Federal Arbitration Act. The certificates and Bylaws are written, the certificates explicitly incorporate the Bylaws, the certificates involve interstate commerce, and the provision mandates arbitration of disputes brought by members, certificate owners, or beneficiaries against the AAL. This arbitration provision is valid, irrevocable, and enforceable.

18. Specifically, the arbitration Bylaw "applies to all past, current and future benefit certificates, members, insured, certificate owners, and beneficiaries." (AAL Bylaws § 12(b).) It applies to all claims, actions, disputes and grievances "of any kind or nature" against the AAL "includ[ing], but . . . not limited to, claims based on breach of benefit contract, as well as claims based on fraud [and] misrepresentation." (*Id.*)

19. The respondents have shown a clear refusal to arbitrate. On August 5, 1999, the respondents initiated litigation in the Circuit Court of Jackson County, Missouri instead of beginning the AAL's alternative dispute resolution process. The respondents later explicitly refused to arbitrate their claims after AAL directed respondents to the arbitration provision and requested arbitration.

20. In the absence of an order compelling the Respondents to arbitrate, AAL will suffer irreparable injury and will be unable to obtain meaningful relief in the arbitration.

PRAYER FOR RELIEF

WHEREFORE, petitioner AAL requests that this court:

A. Enjoin the respondents from pursuing the Missouri action.

B. Compel arbitration of claims asserted by the respondents in their litigation in Missouri as required by the contracts between AAL and the respondents.

C. Award AAL relief, including its costs and reasonable attorney's fees.

D. Any other relief the court deems appropriate.

Dated: October 12, 1999

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AID ASSOCIATION FOR LUTHERANS

Articles of Incorporation and Bylaws

December 15, 1977
Amended August 3, 1978

PREFACE

The AAL Articles of Incorporation and Bylaws, printed in this brochure, are part of your fraternal contract with Aid Association for Lutherans. (See bylaws, section 4, page two.) They set the framework within which all AAL programs, operations and policies must fall.

Members of the AAL Board of Directors, as representatives of all AAL members, use the bylaws and articles to make decisions about corporate objectives, policies and strategy. These decisions, in turn, dictate the course of management decisions.

Articles of Incorporation

I
Name

The name of this fraternal benefit society shall be "Aid Association for Lutherans."

II
Place of Business

The principal office of this fraternal benefit society shall be at Appleton, Wisconsin.

III
Powers

For the purposes set forth in these articles, Aid Association for Lutherans, a Wisconsin corporation organized and

operating under the laws governing Fraternals, shall have all the powers granted by law.

IV
Purpose

The purpose of Aid Association for Lutherans is to associate Lutherans and their families and thereby enable them through membership in this fraternal benefit society to aid themselves and others with programs of:

1. Insurance and other benefits permissible under the laws governing Fraternals; and
2. Fraternal and benevolent activities in local branches; and
3. Assistance to Lutheran congregations and their institutions; and
4. Assistance to such other lawful social, intellectual, educational, charitable, benevolent, moral, fraternal, patriotic, or religious endeavors as the board of directors may determine.

V
Supreme Governing Body

The supreme governing body shall be a board of directors made up of benefit members of this fraternal benefit society. The board shall consist of the president, twelve elective directors and such appointive directors as the board may appoint in a manner prescribed in the bylaws. The elective directors shall be elected by the benefit members in a manner prescribed in the bylaws, and shall constitute a majority of the board in number.

VI
Membership

1. Classes of members – There shall be the following classes of members:

   A. Benefit member – is a person of insurance age 16 or more who has been accepted for membership in accordance with eligibility rules as determined by resolution of the board of directors and who is issued a certificate of membership and insurance, or who receives a settlement agreement benefit by virtue of such insurance. When more than one person in a family is covered in a single certificate only the applicant is a benefit member. Benefit members may participate in the affairs and activities of the local branch in which they are members and may hold office therein. Benefit members shall also have the right to vote in the corporate and insurance affairs of this fraternal benefit society according to the articles and bylaws.

   B. Associate member – is a person age 16 or more who has been accepted for membership in accordance with eligibility rules as determined by resolution of the board of directors and who has been issued a certificate of membership. Associate members may participate in the affairs and activities of the local branch in which they are members, and may hold office therein, but shall not have the right to vote in the corporate and insurance affairs of this fraternal benefit society.

2. Juveniles. This fraternal benefit society may insure the lives or disability of children younger than the minimum age for benefit membership but otherwise eligible for benefit membership. Such insurance shall be issued upon the application of some adult person who shall not by reason thereof, nor by reason of any benefit providing

waiver of premiums, become a benefit member. At insurance age 16 the insured juvenile shall become a benefit member.

VII
Branches

Local branches may be chartered by the board of directors in a manner prescribed in the bylaws, and shall have such powers as the board of directors shall determine.

VIII
Bylaws

The board of directors shall have power to make bylaws, and to repeal or amend them. Notice of changes to the bylaws shall be given to benefit members and applicants for juvenile insurance in a manner prescribed in the bylaws.

IX
Amendments

These articles may be amended or repealed in whole or in part by a majority of the votes cast by benefit members. Before submitting such changes to a vote of the benefit members, the board of directors shall approve such changes by an affirmative vote of a majority of the full board. Upon adoption by the benefit members such changes shall be filed with the commissioner of insurance of the state of Wisconsin and shall be published in the official publication in a manner prescribed in the bylaws.

DEFINITIONS

Section 1. Wherever the term "the Association" appears in these Bylaws, it means "Aid Association for Lutherans."

Wherever the term "board" appears in these Bylaws, it means "board of directors."

Wherever the term "home office" appears in these Bylaws, it means "principal office."

APPLICATION FOR MEMBERSHIP

Section 2. Application for benefit membership shall be upon a form in use by the Association. It shall be accompanied by evidence of insurability (if required) which is acceptable to the Association under its rules and regulations.

Application for associate membership, if such be authorized by the board, shall be upon a form in use by the Association.

JUVENILE INSURANCE

Section 3. Application for juvenile insurance shall be upon a form in use by the Association and shall be accompanied by evidence of insurability (if required) which is acceptable to the Association under its rules and regulations. Juvenile certificates shall be under the control of the applicant for the period provided in the certificate. If it be in the best interest of the juvenile as determined by the Association, the applicant may be divested of control of a

juvenile certificate. If the applicant has been divested of control of the juvenile certificate or if the applicant has died, control shall be vested in the legally appointed guardian of the juvenile. If a guardian is not appointed, control shall be vested in some person who shall appear to the Association to be equitably entitled to it by reason of being responsible for the support and maintenance of such juvenile, or by reason of relationship.

FRATERNAL CONTRACT

Section 4. The certificate of membership and insurance, together with any riders or endorsements attached to it, the application, the declaration of insurability (if any) signed by the applicant, the Articles of Incorporation and Bylaws and all amendments to them, constitute the entire contract when it is issued. Any subsequent changes to the Articles of Incorporation of Bylaws shall be binding upon the member, beneficiaries, or other persons affected, and shall govern and control in all respects, except that no changes shall destroy or diminish benefits promised in the certificate when it was issued.

BENEFICIARIES
Amended August 3, 1978

Section 5. Any of the following persons may be designated as beneficiary: the applicant benefit member, wife, husband, child, parent, or other person related to the benefit member by blood, marriage, or legal adoption; foster parents of the benefit member; betrothed of the benefit member; dependents of the benefit member; or, where not prohibited by law, the estate of the benefit member. With the consent of the Association, any of the

following may also be designated as beneficiary: a charitable institution: church or church organization: education institution: a nonprofit corporation: any corporation, community chest, fund, or foundation described in section 501(c)(3) of the Internal Revenue Code of 1954 and its subsequent amendments, and operated exclusively for religious, charitable, scientific, literary, or educational purposes; or a person, corporation, partnership, or other legal entity which has an interest in the benefit member, provided that the proceeds are for the benefit, direct or indirect, of the benefit member or the benefit member's family or dependents. Wherever the applicable laws conflict with the above, only beneficiaries permitted by such laws may be designated.

Section 6. Unless the beneficiary designation calls for some other method of distribution, if some beneficiaries of the same class die before the insured, the death benefit proceeds shall be paid in full to the surviving beneficiaries of the same class. Each shall share equally the portion of the death benefit proceeds not otherwise disposed of in the certificate. If all beneficiaries, however designated, are dead when the insured dies, the death benefit proceeds – where not otherwise required by law – shall be paid to the owner or to the owner's estate.

A beneficiary shall not have or acquire any claim against the Association whatever until the insured dies unless otherwise provided by law.

Section 7. No beneficiary change shall take effect unless received by the Association at its home office. When it is received, any change shall take effect as of the date the request for beneficiary change was signed, as long as the request for change was mailed or actually delivered, to the

Association while the insured was alive. Such beneficiary change shall be null and void where the Association has made a good faith payment of the proceeds or has taken other action before receiving the change.

SETTLEMENT OPTIONS

Section 8. In addition to the settlement options offered in the certificate, the Association may offer any other manner of settlement made available by the Association at the time certificate proceeds are to be paid.

MAINTENANCE OF SOLVENCY
Amended August 3, 1978

Section 9. If the Association's reserves for any class of certificates become impaired, the board may require that benefit members pay the Association an equitable amount to eliminate the deficiency. If the amount is not paid, it shall be charged as an indebtedness against the certificate and shall draw interest at the lower rate of either what is specified in the certificate for certificate loans or what is specified in the certificate under the maintenance of solvency provision. If the owner of the certificate agrees, an equivalent reduction in benefits can be chosen instead of the payment or indebtedness charged against the certificate.

TAXES

Section 10. If any jurisdiction requires the Association to pay any sum as a tax on its operations, the board may determine an equitable apportionment of the full amount of the taxes paid and make a levy of such amount upon the

benefit members and insureds residing in that jurisdiction. Notice of the levy including the manner in which it is to be paid, shall be given to those affected. If the amount levied is not paid after 60 days from the date of the notice, the amount shall be charged as an indebtedness against the certificate and draw interest at 5 percent per annum compounded annually.

RIGHT OF ACTION

Section 11. No court action may be started on any claim arising out of a certificate of insurance, unless the action is started within the time allowed by the laws of the jurisdiction in which the cause of action accrues. In the absence of any such laws, the court action must be started within three years from the date the claim arises.

RECEIPT OF PAYMENTS NOT A WAIVER

Section 12. If the Association receives and temporarily holds a payment of premium, this shall not constitute a waiver of any of its defenses. If a certificate has lapsed or been forfeited, or if the Association has received a notice of cancellation, the payment of any premium for the certificate shall not revive or continue the certificate, whether made on notice of premium due or otherwise, and the payment shall be returned to the person making it.

BOARD OF DIRECTORS

Section 13. The affairs of the Association shall be managed under the direction of the board. The board shall meet quarterly at dates to be set by the board. All meetings shall be held at the home office of the Association

unless some other place is designated by the president or board. Special meetings may be called by the president or board. Special meetings may be called by the president or upon written request to the secretary by at least five members of the board. The president or secretary shall notify board members, in writing or by personal delivery, of the purpose, time and place of special meetings at least seven calendar days before the date of the meetings. Except in the case of removal of a director from office for cause, board members may waive their right to receive notice individually and the board, by unanimous vote of the full board, may suspend the requirement to give such notice.

Section 14. The board shall elect a chairman from the membership of the board for a term of up to one year. The chairman shall preside at all meetings of the board and perform such other duties as may be designated by the board. The president shall preside at meetings of the board in the absence of the chairman.

Section 15. A majority of the members of the board shall constitute a quorum to transact all business unless otherwise required in the Articles of Incorporation or Bylaws of the Association.

ELECTION OR APPOINTMENT OF DIRECTORS

Section 16. Twelve benefit members shall be elected to the board for terms of office of four years each, three members being elected each year in the following manner: The board, as well as each branch, shall have the right to nominate benefit members as candidates for director. All nominations must be reported to the secretary of the Association at the home office within the time specified by the board. The secretary shall report the nominations to the board. The board shall then direct the secretary to prepare the ballot and give notice of the election, specifying the time and procedures for election. Each branch shall conduct an election meeting within the time specified at which a vote shall be taken on the candidates and shall be reported in the manner and within the time specified in the notice of election. Those elective directors whose terms do not expire with the current election shall constitute the Election Committee. The tabulation of results of the election shall be done by an independent certified public accounting firm selected by the board to report to the Election Committee. The Election Committee shall declare the three candidates receiving the highest number of valid votes to be duly elected for a term beginning with the first quarterly meeting of the board in the year following election.

Section 17. The board may appoint up to three benefit members of the Association to serve as appointive directors for a term of office of one year. Such appointment or any reappointment shall require the affirmative vote of a majority of the elective directors.

Section 18. Benefit members of the Association shall not be eligible for election to the board for an initial term if

they shall have passed their 60th birthday on the first day of January of the year in which their term would begin. No elective or appointive director shall serve beyond his or her 70th birthday. No employee of the Association shall be eligible for election to the board nor shall any former employee be eligible for election to the board until the expiration of two years from the date of termination of employment.

Section 19. A director may be removed from office for cause by an affirmative vote of a majority of the full board at a meeting of the board called for that purpose.

Section 20. Vacancies in elective directorship positions shall be filled as soon as possible by an affirmative vote of a majority of the remaining elective directors. Such directors shall fill the unexpired terms and shall be considered elective directors.

COMMITTEES OF DIRECTORS

Section 21. The board of resolution adopted by a majority of the full board may designate an executive committee and one or more additional committees of directors. Each committee shall consist of three or more directors who serve by appointment of the board. Each committee shall have such authority as delegated to it by the board. A majority of the members of each committee of directors shall constitute a quorum for the transaction of all committee business. Vacancies occurring on committees of directors shall be filled by the board as soon as possible.

OFFICERS OF THE ASSOCIATION

Section 22. The principal officers of the Association shall be the holders of the office of president, secretary, and treasurer, and all vice presidents except second vice presidents and assistant vice presidents. Principal officers shall be elected by the board and shall serve at the pleasure of the board. Officers other than principal officers shall be appointed by the president.

Section 23. The president shall be the chief executive officer of the Association and shall be responsible only to the board. All other officers and employees of the Association shall be under the president's supervision and control. Subject to the control and direction of the board, all activities and operations of the Association shall be under the president's supervision and control. The president shall be an ex officio member of the board.

Section 24. The board shall fix reasonable compensation for directors and principal officers. The president shall fix compensation for officers other than principal officers, in accordance with policies established by the board.

OFFICIAL PUBLICATION

Section 25. The official publication of the Association shall be called *Correspondent*. Any notice, report, or statement required by law, including notice of election, may be published in *Correspondent*. If Association records show that two or more benefit members or applicants for juvenile insurance have the same mailing address, a *Correspondent* mailed to one of them is deemed mailed to all of them at the same address unless a separate copy is requested.

All amendments to the Articles of Incorporation and Bylaws of the Association shall be published in *Correspondent* not later than four months after the date of filing such amendments with the Commissioner of Insurance of the state of Wisconsin.

An affidavit by the secretary of the Association certifying that *Correspondent* was mailed in accordance with this section shall be submitted to the board at its next meeting after publication of any notice, report, or statement required by law. The affidavits shall be filed in the records of the secretary's office.

FISCAL YEAR

Section 26. The fiscal year of the Association shall begin on the first day of January and end on the thirty-first day of December.

ANNUAL REPORT

Section 27. An annual statement of the transactions of each fiscal year shall be prepared and published in *Correspondent* within four months following the close of each fiscal year.

LOCAL BRANCHES

Section 28. Branches shall be created and maintained to foster voluntary activity for aiding such lawful social, intellectual, educational, charitable, benevolent, moral, fraternal, patriotic or religious endeavors as the branch determines in accord with policies of the board; to provide members with the opportunity to take part in benevolent and charitable activities of the Association; and to provide

benefit members with the opportunity to exercise their right to vote in the corporate and insurance affairs of the Association.

Section 29. Branches shall be chartered by resolution of the board upon petition to it, of 10 benefit members who live in the same general locality. The petition shall indicate acceptance of the Articles of Incorporation and By-laws of the Association and the constitution for local branches. Petitions for branch charters by groups of less than 10 benefit members may be specially considered by the board, and charters may be issued pursuant to such petitions when the board finds that the circumstances are justified. Charters may be withdrawn when the board determines it to be in the best interests of the Association. The form of petition, charter, and constitution for local branches shall be adopted by the board.

Section 30. Regular meetings of the branches shall be held at least monthly. Meetings for election of directors and branch officers shall be held according to procedures and during the time prescribed by the board.

Section 31. Branches may voluntarily join together to form regional groupings of branches to assist each other in the performance of their fraternal and benevolent activities, subject to the supervision and control of the board.

INDEMNIFICATION AND FIDELITY BONDS

Section 32. The Association may indemnify and have insurance on such directors and officers against liability for such acts or omissions in the performance of their duties as determined by resolution of the board. The Association may also indemnify and have insurance on

any person who is or was serving at the request of the Association as a director, officer or trustee of another corporation, partnership, joint venture, trust or other enterprise, or any director, officer or employee who is or was serving in a fiduciary capacity with regard to any employee benefit plan, against such liability as determined by resolution of the board.

The Association shall maintain fidelity bonds on the officers and employees as determined by resolution of the board.

AMENDMENTS

Section 33. These Bylaws may be repealed or amended, or new bylaws may be adopted, at any regular meeting of the board or at any special meeting called for that purpose. Notice of the proposed change shall be mailed or personally delivered to board members at least 30 calendar days before the date of the meeting. Board members may waive their right to receive notice individually and the board, by unanimous vote of the full board, may suspend the requirement to give such notice. The number of votes required to repeal or amend these Bylaws, or adopt new bylaws, shall be an affirmative vote of a majority of the full board. Such changes shall be effective from the date of passage or at such other date as stipulated by the board and shall be filed promptly after adoption with the Commissioner of Insurance of the state of Wisconsin. After filing, the changes shall be published in the official publication as prescribed in these Bylaws.

(LOGO)

AID ASSOCIATION FOR LUTHERANS

Articles of Incorporation and Bylaws

PREFACE

The AAL Articles of Incorporation and Bylaws, printed in this brochure, are part of your fraternal contract with Aid Association for Lutherans. (See bylaws, section 4, page two.) They set the framework within which all AAL programs, operations and policies must fall.

Members of the AAL Board of Directors, as representatives of all AAL members, use the bylaws and articles to make decisions about corporate objectives, policies and strategy. These decisions, in turn, dictate the course of management decisions.

Articles of Incorporation

As amended January 1, 1986

I
Name

The name of this fraternal benefit society shall be "Aid Association for Lutherans."

II
Place of Business

The principal office of this fraternal benefit society shall be at Appleton, Wisconsin.

III
Powers

For the purposes set forth in these articles, Aid Association for Lutherans, a Wisconsin corporation organized and operating under the laws governing Fraternals, shall have all the powers granted by law.

IV
Purpose

The purpose of Aid Association for Lutherans is to associate Lutherans and their families and thereby enable them through membership in this fraternal benefit society to aid themselves and others with programs of:

1. Insurance and other benefits permissible under the laws governing Fraternals; and
2. Fraternal and benevolent activities in local branches; and
3. Assistance to Lutheran congregations and their institutions; and
4. Assistance to such other lawful social, intellectual, educational, charitable, benevolent, moral, fraternal, patriotic or religious endeavors as the board of directors may determine.

V
Supreme Governing Body

The supreme governing body shall be a board of directors made up of benefit members of this fraternal benefit society. The board shall consist of 12 elective directors, such appointive directors as the board may appoint in a manner prescribed in the bylaws, and not more than two

principal officers of the society designated by the board from time to time. The elective directors shall be elected by the benefit members in a manner prescribed in the bylaws, and shall constitute a majority of the board in number.

VI
Membership

1. **Classes of members.** There shall be the following classes of members:

   A. **Benefit member.** A benefit member is a person of age 16 or more who has been accepted for membership in accordance with eligibility rules as determined by resolution of the board of directors and who is issued a certificate of membership and insurance, or who receives a settlement agreement benefit by virtue of such insurance. When more than one person in a family is covered in a single certificate only the applicant is a benefit member. Benefit members may participate in the affairs and activities of the local branch in which they are members and may hold office therein. Benefit members shall also have the right to vote in the corporate and insurance affairs of this fraternal benefit society according to the articles and bylaws.

   B. **Associate member.** An associate member is a person age 16 or more who has been accepted for membership in accordance with eligibility rules as determined by resolution of the board of directors and who has been issued a certificate of membership. Associate members may participate in the affairs and activities of the local branch in which they are members, and may hold office therein,

but shall not have the right to vote in the corporate and insurance affairs of this fraternal benefit society.

2. **Juveniles.** This fraternal benefit society may insure the lives or disability of children younger than the minimum age for benefit membership but otherwise eligible for benefit membership. Such insurance shall be issued upon the application of some adult person who shall not by reason thereof, nor by reason of any benefit providing waiver of premiums, become a benefit member. At age 16 the insured juvenile shall become a benefit member.

VII
Branches

Local branches may be chartered by the board of directors in a manner prescribed in the bylaws, and shall have such powers as the board of directors shall determine.

VIII
Bylaws

The board of directors shall have power to make bylaws, and to repeal or amend them. Notice of changes to the bylaws shall be given to benefit members and applicants for juvenile insurance in a manner prescribed in the bylaws.

IX
Amendments

These articles may be amended or repealed in whole or in part by a majority of the votes cast by benefit members. Before submitting such changes to a vote of the benefit

members, the board of directors shall approve such changes by an affirmative vote of a majority of the full board. Upon adoption by the benefit members such changes shall be filed with the commissioner of insurance of the state of Wisconsin and shall be published in the official publication in a manner prescribed in the bylaws.

Bylaws

As amended March 27, 1999

DEFINITIONS

Section 1. Wherever the term "the Association" appears in these bylaws, it means "Aid Association for Lutherans." Wherever the term "board" appears in these bylaws, it means "board of directors." Wherever the term "home office" appears in these bylaws, it means "principal office."

APPLICATION FOR MEMBERSHIP

Section 2. Application for benefit membership shall be upon a form in use by the Association. It shall be accompanied by evidence of insurability (if required) which is acceptable to the Association under its rules and regulations.

Application for associate membership, if such be authorized by the board, shall be upon a form in use by the Association.

JUVENILE INSURANCE

Section 3. Application for juvenile insurance shall be upon a form in use by the Association and shall be accompanied

by evidence of insurability (if required) which is acceptable to the Association under its rules and regulations. Juvenile certificates shall be under the control of the applicant for the period provided in the certificate. If it be in the best interest of the juvenile as determined by the Association, the applicant may be divested of control of a juvenile certificate. If the applicant has been divested of control of the juvenile certificate or if the applicant has died, control shall be vested in the legally appointed guardian of the juvenile. If a guardian is not appointed, control shall be vested in some person who shall appear to the Association to be equitably entitled to it by reason of being responsible for the support and maintenance of such juvenile, or by reason of relationship.

FRATERNAL CONTRACT

Section 4. The certificate of membership and insurance, together with any riders or endorsements attached to it, the application, the declaration of insurability (if any) signed by the applicant, the articles of incorporation and bylaws and all amendments to them, constitute the entire contract when it is issued. Any subsequent changes to the articles of incorporation or bylaws shall be binding upon the member, beneficiaries, or other persons affected, and shall govern and control in all respects, except that no changes shall destroy or diminish benefits promised in the certificate when it was issued.

BENEFICIARIES

Section 5. Any of the following persons may be designated as beneficiary: the applicant benefit member, wife, husband, child, parent or other person related to the

benefit member by blood, marriage or legal adoption; foster parents of the benefit member; betrothed of the benefit member; dependents of the benefit member; or, where not prohibited by law, the estate of the benefit member. With the consent of the Association, any of the following may also be designated as beneficiary: a charitable institution; church or church organization; educational institution; a nonprofit corporation; any corporation, community chest, fund, or foundation described in section 501(c)(3) of the Internal Revenue Code of 1954 and its subsequent amendments, and operated exclusively for religious, charitable, scientific, literary or educational purposes; or a person, corporation, partnership or other legal entity which has an interest in the benefit member, provided that the proceeds are for the benefit, direct or indirect, of the benefit member or the benefit member's family or dependents. Wherever the applicable laws conflict with the above, only beneficiaries permitted by such laws may be designated.

Section 6. Unless the beneficiary designation calls for some other method of distribution, if some beneficiaries of the same class die before the insured, the death benefit proceeds shall be paid in full to the surviving beneficiaries of the same class. Each shall share equally the portion of the death benefit proceeds not otherwise disposed of in the certificate. If all beneficiaries, however designated, are dead when the insured dies, the death benefit proceeds – where not otherwise required by law – shall be paid to the owner or to the owner's estate.

A beneficiary shall not have or acquire any claim against the Association whatever until the insured dies unless otherwise provided by law.

Section 7. No beneficiary change shall take effect unless received by the Association at its home office. When it is received, any change shall take effect as of the date the request for beneficiary change was signed, as long as the request for change was mailed or actually delivered to the Association while the insured was alive. Such beneficiary change shall be null and void where the Association has made a good faith payment of the proceeds or has taken other action before receiving the change.

SETTLEMENT OPTIONS

Section 8. In addition to the settlement options offered in the certificate, the Association may offer any other manner of settlement made available by the Association at the time certificate proceeds are to be paid.

MAINTENANCE OF SOLVENCY

Section 9. If the Association's reserves for any class of certificates, other than those portions of any certificate that provide variable benefits based on the experience of a separate account authorized under Section 10, become impaired, the board may require that benefit members pay the Association an equitable amount to eliminate the deficiency. If the amount is not paid, it shall be charged as an indebtedness against the certificate and shall draw interest at the lower rate of either what is specified in the certificate for certificate loans or what is specified in the certificate under the maintenance of solvency provision. If the owner of the certificate agrees, an equivalent reduction in benefits can be chosen instead of the payment or indebtedness charged against the certificate.

SEPARATE ACCOUNTS AND VARIABLE CONTRACTS

Section 10. The board of directors may provide for the establishment and operation of one or more separate accounts in accordance with applicable law. AAL may issue contracts on a variable basis that provide for the dollar amount of benefits or other contractual payments or values to vary so as to reflect the investment results of such separate accounts. The board of directors may adopt special procedures or create legal entities necessary or appropriate for the conduct of the business and affairs of any variable contract and separate account. Any provisions of the AAL Bylaws that are inconsistent with the provisions of this bylaw shall not apply to any variable contract or separate account.

TAXES

Section 11. If any jurisdiction requires the Association to pay any sum as a tax on its operations, the board may determine an equitable apportionment of the full amount of the taxes paid and make a levy of such amount upon the benefit members and insureds residing in that jurisdiction. Notice of the levy including the manner in which it is to be paid, shall be given to those affected. If the amount levied is not paid after 60 days from the date of the notice, the amount shall be charged as an indebtedness against the certificate and draw interest at 5 percent per annum compounded annually.

RESOLUTION OF DISPUTES

Section 12.

(a) Purpose. The purpose of this section is to prescribe the sole means to present and resolve grievances, complaints or disputes brought by members, certificate owners or beneficiaries, against the Association or its directors, officers, agents and employees. Procedures set forth in this section are meant to provide prompt, fair and efficient opportunities for dispute resolution, consistent with the fraternal nature of the Association, without the delay and expense of formal legal proceedings.

(b) Scope. This section applies to all past, current and future benefit certificates, members, insureds, certificate owners, and beneficiaries. It applies to all claims, actions, disputes and grievances of any kind or nature whatsoever. It includes, but is not limited to, claims based on breach of benefit contract, as well as claims based on fraud, misrepresentation, violation of statute, discrimination, denial of civil rights, conspiracy, defamation, and infliction of distress, against the Association or its directors, officers, agents or employees. This section does not apply to claims or disputes made after the applicable statute of limitations has expired. This section does not apply to actions brought by the Association, including, but not limited to, actions for declaratory judgment, determining proper payees, recovering amounts due, and contesting insurance coverage or membership eligibility.

(c) Procedures. No lawsuits or any other actions may be brought for any claims or disputes covered by this section. The following are the steps and procedures for presenting and resolving disputes:

Step 1. Appeal. Appeal of the dispute to a designated reviewer within the Association as appropriate to the dispute.

Step. 2 Mediation. If step 1 does not result in a mutually satisfactory resolution, either party has the right to have the matter mediated in accord with the applicable mediation rules of the American Arbitration Association (or other neutral organization as agreed upon by the parties).

Step 3. Arbitration. If there is still no mutually satisfactory resolution, the matter will be resolved by binding arbitration in accord with rules of the American Arbitration Association. The arbitrator(s) may award any actual damages incurred for which there is liability, but may not award attorneys' fees, or compensatory, exemplary, extra-contractual or punitive damages. The decision of the arbitrator(s) is binding and final. Additional procedural rules may be defined in policies established by the Association and made available upon request. If a claim or dispute is subject to law that prohibits parties from agreeing to submit future disputes to binding arbitration, arbitration results shall be non-binding, unless both the individual and the Association voluntarily agree to binding arbitration after the claim or dispute has arisen.

(d) Costs. Fees and expenses of the mediator and/or arbitrator shall be paid out of a dispute resolution fund established by the Association. This does not include attorneys' fees, experts' fees, or discovery costs, which each party shall bear as its own responsibility.

(e) Joinder of Disputes. No claim or dispute may be brought against the Association or its directors, officers, agents or employees, in a representative capacity, or on behalf of any "class" of persons or members. Claims of multiple persons may be joined and presented

under this section provided all affected members, certificate owners and beneficiaries consent in writing, or if the Association determines that joinder is appropriate.

RECEIPT OF PAYMENTS NOT A WAIVER

Section 13. If the Association receives and temporarily holds a payment of premium, this shall not constitute a waiver of any of its defenses. If a certificate has lapsed or been forfeited, or if the Association has received a notice of cancellation, the payment of any premium for the certificate shall not revive or continue the certificate, whether made on notice of premium due or otherwise, and the payment shall be returned to the person making it.

BOARD OF DIRECTORS

Section 14. The affairs of the Association shall be managed under the direction of the board. The board shall meet quarterly at dates to be set by the board. All meetings shall be held at the home office of the Association unless some other place is designated by the chief executive officer or board. Regular or special meetings of the board of directors or its committees may also be conducted by other means of communication, as prescribed by Wisconsin law, if so designated by the board, the chairman of the board, the chief executive officer, or the chairman of the committee of the board with respect to committee meetings. Special meetings may be called by the chief executive officer or upon written request to the secretary by at least five members of the board. The chief executive officer or secretary shall notify board members, in writing or by personal delivery, of the purpose, time and place of

special meetings at least seven calendar days before the date of the meetings. Except in the case of removal of a director from office for cause, board members may waive their right to receive notice individually and the board, by unanimous vote of the full board, may suspend the requirement to give such notice.

Section 15. The board shall elect a chairman of the board and vice chairman of the board from among its members for a term of up to one year. The chairman shall preside at all meetings of the board and perform such other duties as may be designated by the board. If the chairman of the board is a principal officer of the Association, he or she shall be responsible only to the board. The vice chairman shall preside at meetings of the board in the absence of the chairman.

Section 16. A majority of the members of the board shall constitute a quorum to transact all business unless otherwise required in the articles of incorporation or bylaws of the Association.

ELECTION OR APPOINTMENT OF DIRECTORS

Section 17. Twelve benefit members shall be elected to the board for terms of office of four years each, three members being elected each year in the following manner: The board, as well as each branch, shall have the right to nominate benefit members as candidates for director. All nominations must be reported to the secretary of the Association at the home office within the time specified by the board. The secretary shall report the nominations to the board. The board shall then direct the secretary to prepare the ballot and give notice of the election, specifying the time and procedures for election. Each branch

shall conduct an election meeting within the time specified at which a vote shall be taken on the candidates and shall be reported in the manner and within the time specified in the notice of election. Those elective directors whose terms do not expire with the current election shall constitute the Election Committee. The tabulation of results of the election shall be done by an independent certified public accounting firm selected by the board to report to the Election Committee. The Election Committee shall declare the three candidates receiving the highest number of valid votes to be duly elected for a term beginning with the first quarterly meeting of the board in the year following election.

Section 18. Vacancies in elective directorship positions shall be filled as soon as possible by an affirmative vote of a majority of the remaining elective directors. Such directors shall fill the unexpired terms and shall be considered elective directors.

Section 19. Except as provided in Section 20, benefit members of the Association shall not be eligible for election to the board for an initial term if they shall have passed their 60th birthday on the first day of January of the year in which their term would begin. No employee of the Association shall be eligible for election to the board nor shall any former employee be eligible for election to the board until the expiration of two years from the date of termination of employment.

Section 20. The board may appoint up to four benefit members of the Association to serve as appointive directors for a term of office of one year. The board may also appoint not more than two principal officers of the Association to serve as directors as the board shall from time to

time determine to be in the Association's best interest. Any appointment or reappointment shall require the affirmative vote of a majority of the elective directors. An appointive director shall be eligible for election pursuant to Section 17 or appointment pursuant to Section 18 if the date of initial appointment as an appointive director preceded such director's 60th birthday.

Section 21. No elective, appointive or principal officer director shall serve beyond December 31 of the year in which age 70 is attained. A director may be removed from office for cause by an affirmative vote of a majority of the full board at a meeting of the board called for that purpose.

COMMITTEES OF DIRECTORS

Section 22. The board by resolution adopted by a majority of the full board may designate a governance committee and one or more additional committees of directors. Each committee shall consist of three or more directors who serve by appointment of the board. Each committee shall have such authority as delegated to it by the board. A majority of the members of each committee of directors shall constitute a quorum for the transaction of all committee business. Vacancies occurring on committees of directors shall be filled by the board as soon as possible.

OFFICERS OF THE ASSOCIATION

Section 23. The principal officers of the Association shall be the chairman of the board, chief executive officer, president, secretary, treasurer and all vice presidents

except second vice presidents and assistant vice presidents. Principal officers shall be elected by the board and shall serve at the pleasure of the board. Officers other than principal officers shall be appointed by the chief executive officer.

Section 24. The board shall elect the person who shall serve as chief executive officer of the Association. The chief executive officer shall be responsible only to the board. All other officers and employees of the Association shall be under the chief executive officer's supervision and control. Subject to the control and direction of the board, all activities and operations of the Association shall be under the chief executive officer's supervision and control.

Section 25. The board shall fix reasonable compensation for directors and principal officers. The chief executive officer shall fix compensation for officers other than principal officers, in accordance with policies established by the board.

OFFICIAL PUBLICATION

Section 26. The official publication of the Association shall be called *Correspondent*. Any notice, report or statement required by law, including notice of election, may be published in *Correspondent*. If Association records show that two or more benefit members or applicants for juvenile insurance have the same mailing address, a *Correspondent* mailed to one of them is deemed mailed to all of them at the same address unless a separate copy is requested.

All amendments to the Articles of Incorporation and Bylaws of the Association shall be published in *Correspondent* not

later than four months after the date of filing such amendments with the Commissioner of Insurance of the state of Wisconsin.

An affidavit by the secretary of the Association certifying that *Correspondent* was mailed in accordance with this section shall be submitted to the board at its next meeting after publication of any notice, report or statement required by law. The affidavits shall be filed in the records of the secretary's office.

FISCAL YEAR

Section 27. The fiscal year of the Association shall begin on the first day of January and end on the thirty-first day of December.

ANNUAL REPORT

Section 28. An annual statement of the transactions of each fiscal year shall be prepared and published in *Correspondent* within six months following the close of each fiscal year.

LOCAL BRANCHES

Section 29. Branches shall be created and maintained to foster voluntary activity for aiding such lawful social, intellectual, educational, charitable, benevolent, moral, fraternal, patriotic or religious endeavors as the branch determines in accord with policies of the board; to provide members with the opportunity to take part in benevolent and charitable activities of the Association; and to provide benefit members with the opportunity to exercise their

right to vote in the corporate and insurance affairs of the Association.

Section 30. Branches shall be chartered by resolution of the board upon petition to it by 10 benefit members who live in the same general locality. The petition shall indicate acceptance of the Articles of Incorporation and By-laws of the Association and the constitution for local branches. Petitions for branch charters by groups of less than 10 benefit members may be specially considered by the board, and charters may be issued pursuant to such petitions when the board finds that the circumstances are justified. Charters may be withdrawn when the board determines it to be in the best interests of the Association. The form of petition, charter and constitution for local branches shall be adopted by the board.

Section 31. Regular meetings of the branches shall be held at least monthly. Meetings for election of directors and branch officers shall be held according to procedures and during the time prescribed by the board.

Section 32. Branches may voluntarily join together to form regional groupings of branches to assist each other in the performance of their fraternal and benevolent activities, subject to the supervision and control of the board.

INDEMNIFICATION AND FIDELITY BONDS

Section 33. The Association shall indemnify any person who is or was a director, officer or employee against liability for acts or omissions in the performance of their duties. The Association shall also indemnify any person who is or was serving at the request of the Association as a

director, officer or trustee of another corporation, partnership, joint venture, trust or other enterprise, or any director, officer or employee who is or was serving in a fiduciary capacity with regard to any employee benefit plan, against liability for acts or omissions in the performance of their duties.

The Association may purchase and maintain insurance on behalf of an individual who is an employee, agent, director or officer of the corporation against liability asserted against and incurred by the individual in his or her capacity as an employee, agent, director or officer, or arising from his or her status as an employee, agent, director or officer, regardless of whether the Association is required or authorized to indemnify or allow expenses to the individual against the same liability. If such insurance is purchased, the amounts shall be as determined by resolution of the board.

The Association shall maintain fidelity bonds on the officers and employees as determined by resolution of the board.

AMENDMENTS

Section 34. These bylaws may be repealed or amended, or new bylaws may be adopted, at any regular meeting of the board or at any special meeting called for that purpose. Notice of the proposed change shall be mailed or personally delivered to board members at least 30 calendar days before the date of the meeting. Board members may waive their right to receive notice individually and the board, by unanimous vote of the full board, may suspend the requirement to give such notice. The number of votes required to repeal or amend these bylaws, or

adopt new bylaws, shall be an affirmative vote of a majority of the full board. Such changes shall be effective from the date of passage or at such other date as stipulated by the board and shall be filed promptly after adoption with the Commissioner of Insurance of the state of Wisconsin. After filing, the changes shall be published in the official publication as prescribed in these bylaws.

(3)

No. 03-677

IN THE

Supreme Court of the United States

GLENN A. HAWKINS, NEDRA J. HAWKINS, MARTIN F. RADMER, GERALD W. BREDENBERG, JOANNE JUST, CHRISTOPHER E. SCHROEDER, AND CHARLES SATTLER,

Petitioners,

v.

AID ASSOCIATION FOR LUTHERANS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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December 19, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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RULE 29.6 STATEMENT

Respondent Aid Association for Lutherans has no parent corporation, and no publicly held company owns 10% or more of its stock.

On January 1, 2002, Lutheran Brotherhood merged into respondent Aid Association for Lutherans. The combined entity subsequently became known as Thrivent Financial for Lutherans, a fraternal benefit society organized under the laws of Wisconsin.

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INTRODUCTION

This is yet another case in which plaintiffs are trying to avoid arbitration by filing a lawsuit, and then litigating to the hilt over whether they are entitled to litigate in the first place. Petitioners here are members of respondent Aid Association for Lutherans ("AAL"), a fraternal benefit society that provides its members with life insurance and other benefits. Under the AAL bylaws, members are required to resolve "all claims, actions, disputes and grievances of any kind or nature whatsoever" with AAL through a series of procedures culminating in binding arbitration, and "[n]o lawsuits or other actions may be brought for any claims or disputes covered by this section." Notwithstanding this clear language, petitioners filed putative nationwide class actions against AAL challenging a variety of insurance sales practices. AAL promptly moved to compel arbitration pursuant to the dispute resolution process set forth in the bylaws, and the courts below correctly recognized that AAL was entitled to such relief. Petitioners, however, are determined to continue their four-year frolic and detour through the judicial system, in manifest derogation of their obligation to arbitrate. Enough is enough. Because the petition presents no issue remotely worthy of this Court's review, this Court should deny the petition.

COUNTERSTATEMENT OF THE CASE

A. Background

AAL is a fraternal benefit society chartered under Wisconsin law with its principal place of business in Appleton, Wisconsin. Pet. App. 2. As a fraternal benefit society, AAL is a non-profit, non-stock membership organization with a representative form of government that provides life insurance and other benefits to its members. *Id.* (citing Wis. Stat. § 614.01). Like other fraternal benefit societies, AAL is not generally regulated by the same laws as commercial insurance companies. Rather, every State (including Wisconsin) has a distinct statutory scheme

governing these organizations. *See id.* (citing Wis. Stat. §§ 614.01 *et seq.*; 632.93 *et seq*).

Under Wisconsin law (like the laws of other States), fraternal benefit societies are not only *authorized* but *required* to use "open" contracts—*i.e.*, contracts that incorporate the society's bylaws and any subsequent amendments thereto, so long as they do not diminish the "benefits" promised in the contract (or "certificate"). *See id.* (citing Wis. Stat. §§ 632.93(1)-(2)). Thus, AAL's bylaws provide that "[a]ny subsequent changes to the articles of incorporation or bylaws shall be binding upon the member, beneficiaries, or other persons affected, and shall govern and control in all respects, except that no changes shall destroy or diminish benefits promised in the certificate when it was issued." Bylaws § 4, Pet. App. 106, 122. And—reflecting these provisions—all of the AAL contracts at issue here specify that AAL's articles of incorporation and bylaws are part of the agreement, and explicitly state that any subsequent amendments to the bylaws are binding on the policyholder. *See* Pet. App. 2.

When petitioners became AAL members and purchased their policies, AAL's bylaws did not prescribe a means for resolving disputes between a member and the organization. *See id.* In March 1999, however, AAL's Board of Directors amended the bylaws to include a Member Dispute Resolution ("MDR") Program. Pet. App. 3. Under the amended bylaws, the MDR Program is "the sole means to present and resolve" any member dispute with AAL. Bylaws § 12(a), Pet. App. 126. The Program established a three-step process designed to resolve disputes outside of litigation. The first two steps of this process are non-binding appeal and mediation. Bylaws § 12(c), Pet. App. 126-27. If these initial non-binding steps do not provide a satisfactory resolution, the bylaws provide that "the matter will be resolved by binding arbitration in accord with rules of the American Arbitration Association." Bylaws § 12(c), Pet. App. 127. The decision of the arbitrator(s) is final and binding on both the claimant and AAL. *See id.* AAL pays the costs of

mediation and/or arbitration, except for the claimant's "attorney's fees, experts' fees, or discovery costs." Bylaws § 12(d), Pet. App. 127. And, just so that there is no ambiguity, the amended bylaws specify that "[n]o lawsuits or any other actions may be brought for any claims or disputes covered by this section." Bylaws § 12(c), Pet. App. 126.

B. The Missouri Lawsuit

In August 1999, petitioners Radmer, Bredenberg, Just, and Schroeder—all AAL members and insureds—filed a putative nationwide class action against AAL in state court in Missouri. The *Radmer* complaint alleged a variety of common-law claims in connection with AAL sales practices. AAL timely removed the action to the U.S. District Court for the Western District of Missouri on diversity grounds. In April 2000, however, that court remanded the action to state court on the ground that the statutory amount-in-controversy requirement of 28 U.S.C. § 1332 was not met. *See* Pet. App. 60-75.

In analyzing this issue, the Missouri court "treat[ed] th[e] putative class action as if it ha[d] been certified," Pet. App. 64 n.1, and held that federal jurisdiction would attach only if "*each* member of the class [could] individually establish the minimum jurisdictional amount." Pet. App. 64 (citing *Zahn v. International Paper Co.*, 414 U.S. 291, 294-95 (1973) (emphasis added)). While assuming that at least one named plaintiff had a claim worth more than $75,000, *see* Pet. App. 65 n.2, the court declined to exercise federal jurisdiction over the putative class action in light of *Zahn*. In particular, the court held that "the legislative history [of the supplemental jurisdiction statute, 28 U.S.C. § 1367] conclusively demonstrates that Congress did not intend to overrule *Zahn* and expand federal jurisdiction by abrogating the rule that each class member must satisfy the $75,000 requirement of § 1332." Pet. App. 72. "[B]ecause plaintiffs' claims may not be aggregated to satisfy § 1332 and because this court may not exercise supplemental jurisdiction pursuant to § 1367 over class

members who cannot meet the $75,000 amount in controversy requirement, this case will be remanded to the Circuit Court of Jackson County, Missouri." Pet. App. 74. Under settled law, AAL was precluded from appealing that ruling. *See* 28 U.S.C. § 1447(d); *In re Business Men's Assurance Co.*, 992 F.2d 181, 182 (8th Cir. 1993) (*per curiam*).

C. The Lawsuits At Issue Here

Section 4 of the Federal Arbitration Act authorizes an independent action to compel arbitration, wholly separate from an action allegedly filed in derogation of an arbitration agreement. *See* 9 U.S.C. § 4. In October 1999, while the *Radmer* action was pending in the U.S. District Court for the Western District of Missouri, AAL brought precisely such an action against the four *Radmer* plaintiffs in the U.S. District Court for the Eastern District of Wisconsin. Pet. App. 3.

Shortly thereafter, in November 1999, petitioner Sattler—an AAL member and insured—filed a putative nationwide class action against AAL in state court in Illinois. Pet. App. 4. Like the underlying *Radmer* complaint in Missouri, the *Sattler* complaint alleged a variety of common-law claims in connection with AAL's insurance certificates. AAL timely removed the action to the U.S. District Court for the Northern District of Illinois on diversity grounds, and AAL amended its petition to compel arbitration in the Eastern District of Wisconsin, adding Sattler as a respondent. The Illinois federal court (Nordberg, J.) subsequently transferred the underlying *Sattler* case to the Eastern District of Wisconsin under 28 U.S.C. § 1404(a). *Id.*

In July 2000, petitioners Glenn and Nedra Hawkins—both AAL members and insureds—filed a putative nationwide class action against AAL in state court in Indiana. *Id.* Like the underlying *Radmer* and *Sattler* complaints, the *Hawkins* complaint alleged a variety of common-law claims in connection with AAL's insurance certificates. AAL timely

removed the action to the U.S. District Court for the Northern District of Indiana on diversity grounds. The *Hawkins* plaintiffs moved to remand the case to state court, but the court (Sharp, J.) denied the motion and transferred the case to the Eastern District of Wisconsin under 28 U.S.C. § 1404(a). Pet. App. 57-58. AAL then moved to compel arbitration of the *Hawkins* claims, just like the *Radmer* and *Sattler* claims, following transfer.

Meanwhile, the *Radmer* plaintiffs moved to dismiss the petition to compel arbitration for lack of subject-matter jurisdiction, and, after the Missouri remand order in April 2000, on the ground that that order was entitled to preclusive effect. Pet. App. 76-87. The Wisconsin federal court (Gordon, J.), however, denied the motion, noting that there was indisputably diversity jurisdiction with respect to one of the *Radmer* plaintiffs (petitioner Schroeder), and that the supplemental jurisdiction statute authorized jurisdiction over the other three *Radmer* plaintiffs. Pet. App. 90 (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997)). The court also rejected the argument that it was bound by the earlier Missouri remand order, noting that "an unappealable remand order issued under § 1447, like the *Radmer* court's, has no preclusive effect." Pet. App. 91 (citing *Benson v. SI Handling Sys., Inc.*, 188 F.3d 780, 783 (7th Cir. 1999); *Health Cost Controls of Ill., Inc. v. Washington*, 187 F.3d 703, 708-09 (7th Cir. 1999)).

Thereafter, in October 2001, the Wisconsin federal court (Clevert, J., upon reassignment) granted AAL's independent petition to compel arbitration of the *Radmer/Sattler* claims, and its motion to compel arbitration of the *Hawkins* claims. Pet. App. 14-36, 37-56. The court then dismissed both the underlying *Hawkins* and *Sattler* lawsuits without prejudice. The court ordered the parties to proceed no further in any other trial court pending the completion of arbitration, and, in

response, the Missouri state court stayed the underlying *Radmer* case (a stay that remains in effect).

Upon petitioners' appeal, the U.S. Court of Appeals for the Seventh Circuit affirmed. As a threshold matter, the court rejected the four *Radmer* petitioners' argument that the Wisconsin district court had erred by refusing to give preclusive effect to the earlier Missouri district court order remanding the underlying *Radmer* case to state court. As the Seventh Circuit explained, "[t]his remand ... was not entitled to preclusive effect because it was unappealable under 28 U.S.C. § 1447(d)." Pet. App. 6 (citing *Benson*, 188 F.3d at 783). The court also noted that the Wisconsin district court's ruling was consistent with Seventh Circuit precedent, "which holds that when one named plaintiff meets the minimum amount-in-controversy threshold, a district court may exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) over the remaining plaintiffs' claims, even if their individual claims do not exceed that amount." *Id.* (citing *Prescription Drugs*, 123 F.3d at 607).

Turning to the merits, the Seventh Circuit rejected petitioners' core contention—that the amendments to AAL's bylaws creating the MDR Program, including the requirement of binding arbitration, were fundamentally unfair—by emphasizing that fraternal benefit societies like AAL are not only *authorized* but *required* to use "open contracts." Pet. App. 7-8. Because petitioners had agreed to be bound by all subsequent amendments to the bylaws, "the fact that [they] were not consulted" when the arbitration provisions were adopted "is of no consequence." *Id.* at 8. The court further declined to consider petitioners' complaints about the unavailability of attorneys' fees and punitive damages in arbitration, noting that "complaints about the unavailability of such remedies first must be presented to the arbitrator." *Id.* at 9. "Because the adequacy of arbitration remedies has nothing to do with whether the parties agreed to arbitrate or if the claims are within the scope of that agreement," the court explained,

"these challenges must first be considered by the arbitrator." *Id.* And "[t]he same reasoning applies to [petitioners'] complaint that they are prohibited from proceeding in arbitration as a class." *Id.* at 10.

Petitioners did not seek rehearing either by the panel or the *en banc* court, but instead moved to stay issuance of the mandate. The Seventh Circuit denied that motion. Petitioners have now asked this Court to review the Seventh Circuit's judgment.

REASONS FOR DENYING THE WRIT

I. The Seventh Circuit Correctly Held That The Missouri Remand Order Is Not Entitled To Preclusive Effect.

Petitioners first argue that the Seventh Circuit erred, and deepened a circuit conflict, by declining to give preclusive effect to the Missouri federal court's remand order even though that order was concededly unappealable under 28 U.S.C. § 1447(d). *See* Pet. 9-18. They are wrong on both scores.[1]

Petitioners base their argument on *Johnson Steel Street-Rail Co. v. William Wharton, Jr. & Co.*, 152 U.S. 252, 261 (1894), a decision that petitioners themselves delicately characterize as "vintage." Pet. 17 n.2. *Johnson Steel*, according to petitioners, established a rule that "a judgment is not to be denied preclusive effect merely because it could not be appealed." *Id.* at 16. But far from establishing any such rule, this Court has emphasized that "[u]nder contemporary principles of collateral estoppel," the unappealable nature of a decision "strongly militates *against* giving [it] preclusive effect." *Standefer v.*

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[1] As a threshold matter, this argument does not even apply to all petitioners, but only to the four *Radmer* petitioners who were parties to the remanded Missouri lawsuit. With respect to the other three petitioners (Sattler and the Hawkinses), it is undisputed that the courts below properly exercised jurisdiction over the claims, and no relief on this ground is feasible. Certainly, the non-*Radmer* petitioners are not allowed to "piggy back" on the *Radmer* plaintiffs' jurisdictional arguments that have no application to their claims.

United States, 447 U.S. 10, 23 (1980) (emphasis added). For that proposition, the *Standefer* Court cited § 68.1 of Tentative Draft No. 3 of the Restatement (Second) of Judgments, which the American Law Institute has since formally adopted. That provision specifies that "relitigation of [an] issue in a subsequent action between the parties is not precluded [when] ... [t]he party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action." *Restatement (Second) of Judgments* § 28(1), at 273 (1980). *Standefer* expressly limited *Johnson Steel* to the proposition that the availability of appellate review is not "*always* an essential predicate of estoppel." 447 U.S. at 23 n.18 (emphasis added).

The potential existence of an *exception* to the general rule set forth in the Restatement and endorsed by this Court in *Standefer*, however, does not negate the rule's existence. Thus, while petitioners seek to wrap themselves in the mantle of *stare decisis* by championing *Johnson Steel*, they actually seek to breach a solid wall of precedent (endorsed by the Restatement and *Standefer*) holding that a remand order unappealable by virtue of 28 U.S.C. § 1447(d) is not entitled to preclusive effect. *See, e.g., Medisys Health Network, Inc. v. Local 348-S United Food & Commercial Workers*, 337 F.3d 119, 124 (2d Cir. 2003) ("Under contemporary principles of collateral estoppel, the unavailability of appellate review of remand orders under § 1447(d) strongly militates against giving a judgment preclusive effect.") (internal quotations omitted); *Christopher v. Stanley-Bostitch, Inc.*, 240 F.3d 95, 100 n.5 (1st Cir.), *cert. denied*, 534 U.S. 820 (2001) (*per curiam*) (emphasizing, in the context of an unappealable remand order, that "[a]s a matter of federal law, unappealable decisions generally do not have preclusive weight"); *Benson v. SI Handling Sys., Inc.*, 188 F.3d 780, 783 (7th Cir. 1999) (Easterbrook, J.) ("[A] district judge's remand order lacks preclusive effect when § 1447(d) blocks appellate review."); *Health Cost Controls of Ill., Inc. v.*

Washington, 187 F.3d 703, 708 (7th Cir. 1999) (Posner, J.) ("An *unappealable* ruling ... is not *res judicata*," specifically including a remand order based on "lack of subject-matter jurisdiction" under § 1447) (emphasis in original).

Because petitioners cannot feasibly argue, in light of *Standefer*, that the decision below contradicts this Court's precedents, they are reduced to arguing that the issue presented "has not been settled by this Court," Pet. 14, and is the subject of a conflict between the decision below and *Napper v. Anderson, Henley, Shields, Bradford & Pritchard*, 500 F.2d 634 (5th Cir. 1974), *see* Pet. 11. The alleged conflict, however, is illusory. *Napper* predates *Standefer*, and is expressly based on *Johnson Steel*. *See Napper*, 500 F.2d at 636-37 (citing *Johnson Steel* for the proposition that "the inability to appeal from the order of remand does not permit the issue actually litigated and determined in the [first federal action] to be relitigated in the second action."). Because *Standefer* endorsed precisely the opposite rule, and essentially limited *Johnson Steel* to its facts, *Napper*'s broad statement is no longer good law in light of *Standefer*.

Indeed, the Fifth Circuit has since cut back on *Napper*, citing Section 28 of the *Restatement (Second) of Judgments* with approval and emphasizing that "the availability of review is of paramount importance to the issue of preclusion." *Winters v. Diamond Shamrock Chem. Co.*, 149 F.3d 387, 395 (5th Cir. 1998); *see also Beiser v. Weyler*, 284 F.3d 665, 673 (5th Cir. 2002) ("If a litigant, as a matter of law, has no right to appellate review, then he has not had a full and fair opportunity to litigate and the issue is not precluded.") (citing *Restatement (Second) of Judgments* § 28); *cf. Health Cost Controls*, 187 F.3d at 708 (citing *Winters* for the proposition that "[a]n *unappealable* ruling ... is not *res judicata*") (emphasis in original). It is telling that petitioners are unable to find any appellate decision in the past quarter-century that applies *Johnson Steel* in this

context.[2] To say the least, petitioners strain credulity by asserting that this issue "is of great practical importance to the proper functioning of the federal judiciary," Pet. 14; this is an issue of very narrow applicability on which, in light of *Standefer*, there is no circuit conflict.[3]

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[2] In support of the *Johnson Steel* rule, the only appellate decisions besides *Napper* that petitioners cite are *Winters v. Lavine*, 574 F.2d 46 (2d Cir. 1978), and *Ex parte Lennon*, 64 F. 320 (6th Cir. 1894), *aff'd on other grounds*, 166 U.S. 548 (1897). *See* Pet. 13-14. Again, petitioners' reliance on those decisions is misplaced. Both decisions, like *Napper*, predate *Standefer* and are expressly based on *Johnson Steel*. *See Winters*, 574 F.2d at 62 (citing *Johnson Steel*); *Lennon*, 64 F. at 322 (citing *Johnson Steel*). And there is no question that, whatever the case before *Standefer*, both the Second and Sixth Circuits now follow the general rule set forth in Section 28 of the *Restatement (Second) of Judgments*. *See, e.g., Concerned Citizens of Cohocton Valley, Inc. v. New York Dep't of Envtl. Conservation*, 127 F.3d 201, 205 (2d Cir. 1997); *Johnson v. Watkins*, 101 F.3d 792, 795 (2d Cir. 1996); *In re DES Litig.*, 7 F.3d 20, 24 (2d Cir. 1993); *Pinkney v. Keane*, 920 F.2d 1090, 1096 & n.9 (2d Cir. 1990); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986); *Century Bus. Servs., Inc. v. Bryant*, 69 Fed. Appx. 306, 312 n.4 (6th Cir. 2003) (unpublished); *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341, 1350 (6th Cir. 1993); *Thacker v. Director, OWCP*, 891 F.2d 292, 1989 WL 149943, at *2 (6th Cir. Dec. 12, 1989) (unpublished).

[3] A distinct, but related, issue involves the preclusive effect owed to legal or factual determinations made in the context of unappealable remand orders. Here too, courts have held that the unappealable nature of such orders deprives such determinations of preclusive effect. *See, e.g., Transit Cas. Co. v. Certain Underwriters at Lloyd's of London*, 119 F.3d 619, 624 (8th Cir. 1997); *Gonzalez-Garcia v. Williamson Dickie Mfg. Co.*, 99 F.3d 490, 492 (1st Cir. 1996); *Nutter v. Monongahela Power Co.*, 4 F.3d 319, 322 (4th Cir. 1993); *Baldridge*, 983 F.2d at 1347-50; *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, 409 (5th Cir. 1991); *Whitman v. Raley's Inc.*, 886 F.2d 1177, 1181 (9th Cir. 1989); *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539, 1540-41 (11th Cir. 1986) (*per curiam*). Several of these decisions erroneously read the Eighth Circuit's decision in *In re Life Insurance Co.*, 857 F.2d 1190, 1193 (8th Cir. 1988), as endorsing the contrary rule. The Eighth Circuit, however, has since set the record straight, acknowledging that determinations made in the context of an unappealable remand order are *not* entitled to preclusive effect, and noting that *In re Life Insurance Co.* had not involved an unappealable remand order at all. *See*

Petitioners' position lacks a basis not only in precedent, but also in principle. The basic point here is straightforward: because "[a]ppellate review plays a central role in assuring the accuracy of decisions," *Gelb*, 798 F.2d at 44, it would be fundamentally unfair to bind a litigant with a trial-court determination that could not be appealed, *see, e.g., Winters*, 149 F.3d at 395. As this Court explained in *Standefer*, "[t]he estoppel doctrine ... is premised upon an underlying confidence that the result achieved in the initial litigation was substantially correct," and "[i]n the absence of appellate review, ... such confidence is often unwarranted." 447 U.S. at 23 n.18; *see also* 18 Charles A. Wright & Arthur Miller, *Federal Practice & Procedure* § 4421, at 559 (2d ed. 2002) ("Since appellate review is an integral part of the system, there is strong reason to insist that preclusion should be denied to findings that could not be tested by the appellate procedure ordinarily available."); *Restatement (Second) of Judgments* § 28 Reporter's Note, at 284 (noting "the pervasive importance of reviewability in the application of preclusion doctrine"); *Winters*, 149 F.3d at 395 ("[T]he availability of review is of paramount importance to the issue of preclusion.").

Against this commonsense point, petitioners note that "the preclusive effect of a judgment is not negated by a conscious decision not to appeal," and suggest that there is no difference between that situation and the situation "where the right to appeal has been precluded by Congress." Pet. 12. That suggestion is baseless. As the Restatement recognizes, there is a world of difference between these two situations: there is no unfairness in giving preclusive effect to an appealable but unappealed decision, and thus issue preclusion properly applies in that context. *See Restatement (Second) of Judgments* § 28 cmt. a, at 274 ("The exception in Subsection (1) applies only when review is precluded as a matter of law. It is does not

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Vincent v. Dakota, Minnesota & E. R.R. Corp., 200 F.3d 580, 581-82 (8th Cir. 2000); *Transit Cas. Co.*, 119 F.3d at 624 n.10.

apply in cases where review is available but is not sought."); *see generally Partmar Corp. v. Paramount Pictures Theatres Corp.*, 347 U.S. 89, 98-99 & n.6 (1954).

At bottom, petitioners' real quarrel is with Congress' decision to authorize an independent federal action to compel arbitration, *see* 9 U.S.C. § 4, and thereby to override the forum selection of a party seeking to flout an arbitration agreement. Contrary to petitioners' assertion, this is not impermissible "forum shopping" by the party seeking to compel arbitration, Pet. 16-17; rather, that party is seeking to enforce its federal right to litigate in an *arbitral* forum. Section 4 of the Federal Arbitration Act simply allows the defendant, not the plaintiff, to choose the forum to decide arbitrability. Petitioners' position would sharply limit that choice, and create the anomaly that an independent action to compel arbitration in the forum of defendants' choice would be barred where, as here, the underlying state-court lawsuit was removed and remanded, but not where the underlying state-court lawsuit was never removed at all. Petitioners may believe that an independent action under Section 4 is "a waste of judicial resources," Pet. 17, but that complaint is properly directed toward Congress, not the courts. And that complaint comes with ill grace, given that any "waste of judicial resources" is entirely the result of *petitioners'* refusal to abide by their obligation to resolve disputes with AAL through the MDR Program.

Because the courts below were fully entitled to decide the jurisdictional issue in accordance with binding Seventh Circuit law, *see* Pet. App. 6 (citing *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 607 (7th Cir. 1997)); Pet. App. 90-91 (same)—law that petitioners have conspicuously and expressly declined to challenge in their petition, *see* Pet. i, 10 n.1—there is no basis for this Court to review that decision.

II. The Seventh Circuit Correctly Held That The Arbitrator Is Entitled To Decide Questions Regarding Limitations on Remedies.

Petitioners next argue that the Seventh Circuit erred by declining to address their challenges to the contractual prohibitions on the availability of (1) punitive damages, (2) attorneys' fees, and (3) class actions in arbitration, instead sending those challenges to the arbitrator. *See* Pet. 18-25. Again, they are wrong.

Petitioners base their argument on *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), and *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). Those decisions, according to petitioners, stand for the proposition that "the question whether the parties have submitted a dispute to arbitration, *i.e.*, the 'question of arbitrability,' is 'an issue for judicial determination unless the parties clearly and unmistakably provide otherwise.'" Pet. 22 (quoting *Howsam*, 537 U.S. at 83; emphasis and brackets omitted). That unremarkable proposition, however, begs the question presented here: whether petitioners' challenge to contractual limitations on the availability of certain remedies and procedures in arbitration involves "a question of arbitrability" in the first place.

As the *Howsam* Court explained just last Term, the category of "questions of arbitrability" is a "narrow" one limited to circumstances "where contracting parties would likely have expected a court to have decided the gateway matter." 537 U.S. at 83. In *Howsam* itself, this Court held that the question whether a dispute has been brought to arbitration in a timely manner—a question that the party resisting arbitration in *Howsam* characterized as a "gateway" matter—is one that the parties likely expected the arbitrators to decide. *Id.* at 84-85. Similarly, this Court last Term sent disputes over the availability of punitive damages in arbitration, *PacifiCare Health Sys., Inc. v. Book*, 123 S. Ct. 1531 (2003), and the

availability of the class-action mechanism in arbitration, *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402 (2003), to the arbitrators for resolution in the first instance.

Thus, if anything, last Term's trilogy of *Howsam*, *PacifiCare*, and *Bazzle* only underscores the sharply limited nature of the judicial inquiry at the pre-arbitration stage. That approach makes sense, because the whole point of arbitration would be undermined if parties could mount extensive preemptive challenges to arbitration remedies and procedures in court. Petitioners' insistence, at a high level of generality, that their challenges involve "questions of arbitrability" is misguided. As the *Howsam* Court noted, "[l]inguistically speaking, one might call any potentially dispositive gateway question a 'question of arbitrability,'" but this Court's precedents have given that phrase "a far more limited scope." 537 U.S. at 83. "Many decisions, of which *Prima Paint* ... is the leading example, hold that defenses to performance—even those that logically defeat arbitration—belong to the arbitrator as long as there is no doubt that the parties agreed to arbitrate." *Metro E. Ctr. for Conditioning & Health v. Qwest Communications Int'l, Inc.*, 294 F.3d 924, 929 (7th Cir.) (Easterbrook, J.), *cert. denied*, 537 U.S. 1090 (2002).

Here, petitioners have no basis to suggest that the parties reasonably would have expected a court, rather than an arbitrator, to address in the first instance the merits of their challenges to contractual limitations on the availability of certain remedies and procedures in arbitration. To the extent a party is aggrieved by an arbitral decision on these issues, that party can always seek vindication through a post-arbitration challenge to enforcement of any arbitral award. *See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985). Because it is clear that the dispute here is covered by the parties' arbitration agreement, there is no question of forcing a party to arbitrate in

the absence of consent. Thus, as the Seventh Circuit recognized, *see* Pet. App. 9-10, challenges to contractual limitations on the availability of certain remedies and procedures in arbitration must be presented to the arbitrators in the first instance. *See also Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821, 823-24 (8th Cir. 2003); *Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024, 1029-32 (11th Cir. 2003); *Bob Schultz Motors, Inc. v. Kawasaki Motors Corp., U.S.A.*, 334 F.3d 721, 726 (8th Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3356 (U.S. Nov. 12, 2003) (No. 03-704); *Musnick v. King Motor Co.*, 325 F.3d 1255, 1261 & n.7 (11th Cir. 2003); *Boomer v. AT&T Corp.*, 309 F.3d 404, 418 n.6 (7th Cir. 2002); *Thompson v. Irwin Home Equity Corp.*, 300 F.3d 88, 91-92 (1st Cir. 2002); *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002); *Larry's United Super, Inc. v. Werries*, 253 F.3d 1083, 1086 (8th Cir. 2001); *MCI Telecomms. Corp. v. Matrix Communications Corp.*, 135 F.3d 27, 33 n.12 (1st Cir. 1998); *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222, 231-32 (3d Cir. 1997).

Petitioners appear to believe that they can circumvent the foregoing authorities by simply asserting that the challenged contractual limitations on the availability of certain remedies and procedures in arbitration render the arbitration agreement itself unconscionable. But the *label* petitioners place on their challenge cannot control the inquiry into whether they are raising a "question of arbitrability" within the meaning of *Howsam*. It makes no sense to think a dispute over a particular contractual limitation must be resolved by the arbitrator when framed as such, but must be resolved by a court when framed under the rubric of "unconscionability." As *Howsam* makes clear, the relevant question is whether the "parties would likely expect that an arbitrator would decide the gateway matter," and

the answer to that question does not turn on how the party resisting arbitration chooses to frame the issue. 537 U.S. at 84.[4]

Nor is there any merit to petitioners' allegation of a conflict between the appellate decisions noted above and the Ninth Circuit's recent decision in *Ting v. AT&T*, 319 F.3d 1126 (9th Cir.), *cert. denied*, 124 S. Ct. 53 (2003). The alleged conflict is illusory for the simple reason that *Ting* never paused to consider the threshold question whether a court or an arbitrator should resolve a challenge to contractual limitations on the availability of certain remedies and procedures in arbitration. Rather, the Ninth Circuit simply assumed, without expressly deciding, that this role belonged to the court, and proceeded to address the issue on the merits. *See* 319 F.3d at 1148-49. Indeed, there is no indication in the decision that the party seeking to compel arbitration ever argued that resolution of these issues belonged to the arbitrator rather than the courts.

Because the Ninth Circuit in *Ting* never considered this issue, that court cannot be deemed to have ruled on it. *See, e.g., Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 n.6 (1995) ("Of course the unexplained silences of [judicial] decisions lack precedential weight."); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (issue not "raised in briefs or argument nor discussed in the opinion of the Court" cannot be taken as "a binding precedent on th[e] point"); *Webster v. Fall*,

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[4] Petitioners thus err by asserting that "[t]he Seventh Circuit *essentially* ruled that the question of whether the arbitration agreement at issue here was substantively unconscionable must 'first be presented to the arbitrator.'" Pet. 23 (quoting Pet. App. 9; emphasis added). The Seventh Circuit held nothing of the sort. To the contrary, the Seventh Circuit addressed most of petitioners' unconscionability arguments on the merits, and simply recognized that challenges to contractual limitations on the availability of certain remedies and procedures in arbitration must be resolved by the arbitrator in the first instance *regardless* of whether presented individually or in the context of an unconscionability argument. Petitioners' assertion that "the Seventh Circuit has effectively parsed the unconscionability defense out of existence," *id.*, is pure hyperbole.

266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents."). If petitioners are correct that the Ninth Circuit would reject the views of all the other circuits to have squarely considered the issue, then there will be ample opportunity in the future for that court to do so.[5] As of yet, it remains premature for this Court to revisit an area that it just canvassed in *Howsam*, *PacifiCare*, and *Bazzle*, and prudence dictates that this recent trilogy of decisions should now be given an opportunity to percolate in the lower courts.

III. Petitioners Forfeited Their Standing Argument Below, And That Argument Is Meritless In Any Event.

Petitioners finally argue that—even though they themselves flouted AAL's MDR Program, with its requirement of binding arbitration, by suing AAL in court—AAL lacks constitutional "standing" to compel arbitration, because arbitration is the third of three steps in the MDR Program, and the first two steps were never undertaken. *See* Pet. 25-29. According to petitioners, "AAL's sole recourse was to bring a breach of contract counterclaim in [the underlying state-court lawsuits], seeking an injunction compelling Petitioners to proceed through the steps

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[5] Petitioners also allege an intra-circuit conflict on this issue in the Third Circuit between *Great Western*, 110 F.3d at 231-32, on the one hand, and *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256 (3d Cir. 2003), on the other. *See* Pet. 20-21 & n.3. The party seeking arbitration in *Alexander*, however, expressly conceded that the unconscionability inquiry was for the court, not the arbitrator, *see* 341 F.3d at 264 n.5, and that case did not purport to overrule *Great Western*. Indeed, rather than "making clear its disagreement with *Great Western*" over the proposition that "'a court … must still ascertain whether the parties entered a valid agreement to arbitrate,'" Pet. 21 n.3 (quoting *Alexander*, 341 F.3d at 264), the *Alexander* court actually *cited Great Western* for that proposition—a citation that petitioners conveniently omit, *see id.* In any event, this Court is not in the business of resolving intra-circuit conflicts; if there is indeed a "conflict within the Third Circuit on this issue," *id.*, then the Third Circuit should address that perceived conflict in the first instance.

of the dispute resolution process." *Id.* at 28. This argument does not pass the straight-face test.

As an initial matter, this argument is not even properly presented here, because petitioners abandoned it below. After raising the argument in the district court—which rejected it out of hand, *see* Pet. App. 32-33—petitioners failed to raise the argument in the Seventh Circuit, and accordingly that court did not address it. It is axiomatic, of course, that "[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212-13 (1998) (internal quotation omitted). To be sure, constitutional standing is a jurisdictional issue, which a court not only *may* but *must* address at any point in the proceedings. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). But to say that this Court might have to address a jurisdictional issue if it were to grant a given petition for certiorari is far different than to say that this Court should grant the petition specifically to address a jurisdictional issue that petitioners themselves forfeited below. By failing to raise the standing argument in the Seventh Circuit, petitioners deprived that court of an opportunity to address the argument, thereby rendering consideration by this Court inappropriate and unwarranted. Petitioners' cite-free assertion that "the Seventh Circuit[]" adopted an "unusually broad and novel view of standing" in this case, Pet. 29, is simply inexplicable.

It is no surprise that petitioners declined to advance this argument in the Seventh Circuit, because the argument is not only groundless but perverse. Petitioners base the argument on two recent cases that declined to compel arbitration where the party seeking to do so had not first complied with contractual conditions precedent to arbitration. *See* Pet. 27 (citing *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003), and *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287 (11th Cir. 2002)). But those cases are readily

distinguishable, because in both cases a party sought to compel arbitration *before* the opposing party filed a lawsuit in defiance of an arbitration agreement. Under those circumstances, the courts recognized, the party seeking to compel arbitration could not leapfrog the contractual conditions precedent to arbitration. *See HIM Portland*, 317 F.3d at 44; *Kemiron*, 290 F.3d at 1291.

Here, in contrast, petitioners themselves sued first, thereby evincing a total rejection of the three-step MDR Program. Under these circumstances, petitioners cannot turn around and block AAL from seeking to compel binding arbitration—the third step in the program—on the ground that the parties did not first exhaust the two non-binding initial steps of internal appeal and mediation. By proceeding straight to court, petitioners necessarily rejected these two preliminary non-binding steps, and are estopped from claiming that *AAL* failed to satisfy the conditions precedent to arbitration.

The relevant precedent here is thus neither *HIM Portland* nor *Kemiron*, but instead *Southwestern Elec. Power Co. v. Local Union No. 738, Int'l B'hood of Elec. Workers,* 293 F.2d 929, 932 (5th Cir. 1961), where, as here, the party seeking arbitration "had justification for a belief that the performance of the conditions precedent [to arbitration] would be useless," because "[t]he repudiation of arbitration as a means of determining the dispute was unequivocal." Under these circumstances, the party resisting arbitration "is estopped to assert now that arbitration cannot be had because the specified conditions precedent had not been performed." *Id.* Petitioners cannot seriously expect the law to reward them for flouting the entire MDR Program by preventing AAL from seeking to compel binding arbitration. As the district court noted, it would be "incongruous"—to say the least—"for this court to decline to enter 'an order directing parties to proceed to arbitration *in accordance with the terms of the agreement*,' because the opposing party refused to comply with the agreement in the first place." Pet. App. 33 (quoting 9 U.S.C. § 4; emphasis added by court). By being forced to

litigate in court in derogation of the MDR Program, AAL's injury is immediate and concrete, not "hypothetical," "speculative," or "conjectural." Pet. 29.

In any event, this argument is manifestly case-specific and factbound, and presents no issue of broader applicability. Accordingly, this Court should deny review on this issue too.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of *certiorari*.

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December 19, 2003

(2)

No. 03-677

Supreme Court, U.S.
FILED
JAN 2 - 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

GLENN A. HAWKINS, NEDRA J. HAWKINS, MARTIN F. RADMER, GERALD W. BREDENBERG, JOANNE JUST, CHRISTOPHER E. SCHROEDER, AND CHARLES SATTLER,

Petitioners,

v.

AID ASSOCIATION FOR LUTHERANS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

This reply brief is limited to the discussion of erroneous or inaccurate characterizations of case authority cited by Respondent.

REASONS FOR GRANTING THE WRIT

I. An order remanding a case for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1447(c) is *res judicata* on the issue of subject matter jurisdiction.

A. Discussion of *Standefer* and *Johnson*. Res. 7-10.

Respondent's arguments based on *Standefer v. United States*, 447 U.S. 10 (1980) ignore the context of *Standefer*, a criminal case in which the Court addressed an assertion of non-mutual collateral estoppel. In that case, the Court declined to give the acquittal of a principal preclusive effect in the subsequent aiding and abetting trial of the co-defendant agent. The Court noted the difference between a criminal trial and a civil trial, including numerous aspects of criminal law that often leave the Government without a full and fair opportunity to litigate.

The Court's focus in *Standefer* was on the unavailability of appellate review of *jury verdicts*. The Court observed that in the criminal context, juries may acquit out of compassion or compromise or because of "their assumption of a power which they had no right to exercise, but to which they were disposed through lenity." [citations omitted]. *Id.* at 22. The civil equivalent is a jury verdict induced by passion or prejudice. *Id.* at 23. The Court's

illustrative reference to the availability of appellate review of civil jury awards does not encompass non-jury judicial determinations such as the remand order in this case.

Standefer did not overrule *Johnson Steel Street-Rail Co. v. Wharton*, 152 U.S. 252 (1894) and did not make *Johnson* a mere "exception" to some new rule. To the contrary, *Standefer* explicitly circumscribed its reference to Restatement § 68.01 by citing *Johnson* and noting that its reference to § 68.01 should not be read "to suggest that the availability of appellate review is always an essential predicate of estoppel. *See Johnson Co. v. Wharton* [citation omitted]." *Standefer*, 447 U.S. at 23, n.18.

Standefer makes clear that *Johnson* remains good law. Respondent's characterization of *Johnson* as an "exception" to Restatement § 28(1) begs the question of whether *Johnson* applies to unappealable remand orders. The first question posed by the Petition for a Writ of Certiorari remains viable and important: is the availability of appellate review of a judicial remand order under 28 U.S.C. § 1447(c) an essential predicate of preclusion?

B. Discussion of cases representing the Circuit Split. Res. 9-10.

Contrary to the representations of Respondent, the Fifth Circuit has not "cut back" on *Napper v. Anderson, Henley, Shields, Bradford & Prichard*, 500 F.2d 634 (5th Cir. 1974). Res. 9. *Beiser v. Weyler*, 284 F.3d 665 (5th Cir. 2002) involved the question of whether a claim "related to" an arbitration agreement so as to confer removal jurisdiction under § 205 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *Beiser* does not address the *res judicata* effect of the jurisdictional ruling

itself, but rather addresses the *res judicata* considerations relevant to any subsidiary findings relating to the *merits* of the case that might have been implied in the jurisdictional ruling. *Beiser* does not mention *Napper.*

Winters v. Diamond Shamrock Chemical Co., 149 F.3d 387 (5th Cir. 1998) likewise did not "cut back" on *Napper*. *Winters* was a case of non-mutual, offensive collateral estoppel. This distinction was significant to the Fifth Circuit which distinguished *Johnson, supra,* as a "true" *res judicata* case, and *Napper* as a case involving mutual offensive estoppel. *Id.* at 396. The case before this Court on the Petition for a Writ of Certiorari is a "true" *res judicata* case involving mutual estoppel and falls within the *res judicata* principles of *Johnson* and *Napper*.

Respondent's characterizations of decisions from the Sixth and Second Circuits are also inaccurate and misleading. *Concerned Citizens of Cohocton Valley, Inc. v. New York State Dep't of Envt'l Conservation*, 127 F.3d 201 (2d Cir. 1997) unequivocally stated that the district court's jurisdictional determination was *res judicata*. ("That ruling [dismissing the case for lack of subject matter jurisdiction] is preclusive only on the narrow issue of whether the state law claims alleged by CCCV can be maintained in federal court.") *Id.* at 206. The Second Circuit recognized a clear distinction between the jurisdictional determination, which was entitled to preclusive effect, and a subsidiary ruling relating to the merits. The general reference in the opinion to the Restatement (Second) of Judgments related to the latter, not the former.

Concerned Citizens of Cohocton Valley is the most recent Second Circuit case cited by Respondent. That case

makes clear that the Second Circuit considers determinations of subject matter jurisdiction to be *res judicata*. *Concerned Citizens of Cohocton Valley* included a discussion of *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38 (2d Cir. 1986), the oldest Second Circuit case cited by Respondent, so there is no doubt that the court had *Gelb* in mind when the opinion was written. The opinions in both *Gelb* and *Concerned Citizens of Cohocton Valley* were written by Judge Jon Newman. Therefore, when Judge Newman wrote in *Concerned Citizens of Cohocton Valley* that the ruling on the subject matter jurisdiction issue was preclusive, it is logical to assume that he saw the issue of the preclusive effect of a determination of subject matter jurisdiction to be distinguishable from the situation in *Gelb*. The other Second Circuit cases cited by Respondent, *In re DES Litigation*, 7 F.3d 20 (2d Cir. 1993), *Pinkney v. Keane*, 920 F.2d 1090 (2d Cir. 1990), and *Johnson v. Watkins*, 101 F.3d 792 (2d Cir. 1996) pre-date *Concerned Citizens of Cohocton Valley* and do not address the precise issue of the preclusive effect of a determination of subject matter jurisdiction.

Respondent's discussion of Sixth Circuit cases suffers from similar mischaracterizations. Res. 10. *Baldridge v. Kentucky-Ohio Transp., Inc.*, 983 F.2d 1341 (6th Cir. 1993) is not an endorsement of the rule set forth in § 28 of the Restatement. *Baldridge* presented the unrelated question of appellate jurisdiction over a § 1447(c) remand order. The Sixth Circuit concluded that it did not have jurisdiction and dismissed the appeal. Respondent's citation to page 1350 of the opinion is presumably directed to the final sentence of the Court's opinion which states that the court's jurisdictional findings do not preclude defendants from raising the substantive defense of preemption in the

remanded state court proceeding. Respondent fails to grasp the distinction in this and other preemption cases it cites that explains why the jurisdictional finding incident to remand did not have preclusive effect in those cases. *Baldridge, Id., Nutter v. Monongahela Power Co.*, 4 F.3d 319 (4th Cir. 1993), *Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406 (5th Cir. 1991), and *Glasser v. Amalgamated Workers Union Local 88*, 806 F.2d 1539 (11th Cir. 1986) are all distinguishable because the lack of preclusive effect turned on the distinction between the jurisdictional determination that there was no complete preemption (and therefore no federal jurisdiction) and the separate, independent substantive defense of preemption which could still be asserted and pursued in the remanded cases.

Two other Sixth Circuit cases cited by Respondent were unpublished opinions. The Local Rules of the Sixth Circuit limit the citation of unpublished opinions to specific situations, none of which is present in this case. Therefore, *Century Bus. Servs., Inc. v. Bryant*, 2003 U.S. App. LEXIS 13877 (6th Cir. 2003) and *Thacker v. Director, OWCP*, 891 F.2d 292 (6th Cir. 1989) should not have been cited to this Court and should be disregarded.

II. Challenges to limitations on remedies and procedures as elements of an unconscionability defense must be addressed by the court and not an arbitrator.

Respondent cites a number of cases in support of its assertion that "challenges to contractual limitations on the availability of certain remedies and procedures in arbitration must be presented to the arbitrators in the first instance." Res. 15. Most of Respondent's cases hold that "an agreement containing a provision that impermissibly

precludes or limits statutorily authorized remedies is still a valid agreement pursuant to which the case is to be sent to arbitration, where the arbitrator decides the remedies issues along with all the others." *See Anders v. Hometown Mortgage Servs., Inc.*, 346 F.3d 1024, 1031 (11th Cir. 2003).

In *Anders*, 346 F.3d at 1031, n.7, as well as *Bailey v. Ameriquest Mortgage Co.*, 346 F.3d 821, 824, n.3 (8th Cir. 2003), the courts found that the inclusion of a severability clause made it appropriate for the arbitrator to first consider the challenges to limitations on statutory rights. The Eleventh Circuit used the existence of the severability clause to distinguish *Anders* from *Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054 (11th Cir. 1998) in which it held an arbitration clause invalid as its remedial restrictions denied the employee the possibility of meaningful relief. There is no such severability clause in the arbitration provision retroactively and unilaterally imposed upon Petitioners in this case. Pet. App. 126-128. In addition, these cases expressly held that the arbitration clause at issue was valid and applicable before holding that the issue of the waiver of statutory and other remedies was for the arbitrator to decide. These cases do not address whether a limitation on remedies is an additional element in determining if the arbitration clause is unconscionable and therefore invalid.

While the Eighth Circuit held in *Arkcom Digital Corp. v. Xerox Corp.*, 289 F.3d 536, 539 (8th Cir. 2002), that "issues of remedy go to the merits of the dispute and are for the arbitrator to resolve in the first instance," the Eighth Circuit expressly noted that the *Arkcom* plaintiffs had not argued that the clause was unconscionable. *Id.* at 539, n.2. Petitioners here have argued that the limitation on remedies is an element of substantive unconscionability

that a court must address in determining whether there is an enforceable arbitration agreement. Pet. 25. Indeed, none of the cases cited by Respondent address the question of unconscionability as a defense to arbitrability.

III. AAL must comply with its conditions precedent before seeking to compel arbitration.

Respondent states that the cases cited by Petitioner, *HIM Portland, LLC v. DeVito Builders, Inc.*, 317 F.3d 41 (1st Cir. 2003) and *Kemiron Atl., Inc. v. Aguakem Int'l, Inc.*, 290 F.3d 1287 (11th Cir. 2002), "are readily distinguishable, because in both cases a party sought to compel arbitration before the opposing party filed a lawsuit in defiance of an arbitration agreement." Res. 18-19. That is not correct. In *HIM*, the plaintiff filed a breach of contract claim in the District Court and it was only after the defendant answered the complaint that the plaintiff moved to compel arbitration. 317 F.3d at 42. In *Kemiron*, the plaintiff brought suit for breach of contract and the defendant responded with a motion to stay pending arbitration. 290 F.3d at 1289. Respondent has misstated the facts of these cases and its contention that these cases are distinguishable is wrong. Respondent must comply with the two conditions precedent before moving to compel arbitration, something it clearly has not done. Pet. 19.

CONCLUSION

The petition for a writ of certiorari should be granted.

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